

No. 98-1509-CFX Title: Columbia Union College, Petitioner
v.
Edward O. Clark, Jr., et al.

Docketed: Court: United States Court of Appeals for
March 19, 1999 the Fourth Circuit

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No. _____

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1998

COLUMBIA UNION COLLEGE,
Petitioner,

v.

EDWARD O. CLARK, JR., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
 United States Court of Appeals
 for the Fourth Circuit

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QUESTIONS PRESENTED

1. Whether a private church-affiliated college may be compelled to undergo an intrusive investigation of religious speech and practice on its campus, on pain of exclusion from a neutrally available state funding program in which other religious and non-religious colleges participate.

2. Whether, in reviewing government aid to church-affiliated higher education, lower courts should follow *Roemer* and similar older cases focusing upon each recipient's religiosity, or should instead follow recent cases such as *Rosenberger*, *Witters*, and *Agostini*, focusing upon the neutrality of an aid program as whole and its safeguards to ensure that government funds are spent only for secular program purposes.

LIST OF PARTIES

The parties to this case are petitioner Columbia Union College and respondents Edward O. Clark, Jr., Edward C. Clark, Jr., the Honorable J. Glenn Beall, Jr., Dorothy Dixon Chaney, Donna H. Cunninghame, John L. Green, Jamie Kendrick, Terry L. Lierman, Osborne A. Payne, Jr., Kathleen Perini, Charles B. Saunders, Jr., Richard P. Street, Jr. and Albert Nathaniel Whiting, in their official capacities as members of the Maryland Commission of Higher Education. Pursuant to Supreme Court Rule 29.6, the Court is advised that petitioner Columbia Union College has no parent companies or subsidiaries that are not wholly owned.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Columbia Union College respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Fourth Circuit is reported at 159 F.3d 151 (4th Cir. 1998) and is reprinted at pages 1a-55a of the appendix to this petition ("Pet. App."). The opinion of the United States District Court for the District of Maryland is reported at 988 F. Supp. 897 (D. Md. 1997) and is reprinted at Pet. App. 56a-73a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued the opinion below on October 26, 1998.

The court of appeals denied a timely request for rehearing and rehearing in banc on December 22, 1998. This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the First Amendment of the Constitution of the United States, this case involves Maryland Code §§ 17-102 through 17-306, and applicable regulations, which are set forth at Pet. App. 81a-102a.

STATEMENT OF THE CASE

This petition seeks review of a court of appeals decision ordering an investigation of religious speech and practice on a college campus. The majority below held that, unless it could be demonstrated by a thorough on-campus investigation that the college was not "pervasively sectarian," the plurality decision in *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976) compelled exclusion of the college from a neutral program of private college aid made available to every other qualified college in the state, including other church-affiliated colleges. The majority reached this result based upon a view of the First Amendment that conflicts with decisions of this Court, other courts of appeals, and a state supreme court. It did so notwithstanding the fact that it had earlier held that exclusion of the college from the program violated the Free Speech and Free Exercise Clauses. This case calls upon the Court to correct conflict among the circuits as to the propriety of the religious "inquisition" (as described by the dissenting judge) ordered below. More importantly, it affords an opportunity for this Court to address the confusion generated by the conflict between older cases like *Roemer* and this Court's more recent Establishment Clause jurisprudence.

The Sellinger Program. In 1971, the Maryland General Assembly created a program of aid to nonpublic institutions of higher education, known since 1993 as the Joseph A. Sellinger Program ("Sellinger Program"). See Md. Code Ann., Educ. § 17-101 *et seq.*, Pet. App. 81a. The Program (named for Father Joseph Sellinger, a Roman Catholic priest) provides state financial aid to a wide range of private colleges. Qualifying institutions receive aid under the Program based upon an automatic formula under which a specified amount of aid is provided to a college for each full-time equivalent student who chooses to attend the college.

Authority to administer the Sellinger Program has been delegated to the Maryland Higher Education Commission ("the Commission"). Md. Code Ann., Educ. § 17-102. Pet. App. 81a-82a. To qualify for funds, an institution must: (1) be a nonprofit private college or university that was established in Maryland before July 1, 1970; (2) be approved by the Commission; (3) be accredited; (4) have awarded the associate of arts or baccalaureate degrees to at least one graduating class; (5) maintain one or more programs leading to such degrees, other than seminarian or theological programs; and (6) submit each new program or major modification of an existing program to the Commission for its approval. Md. Code Ann., Educ. § 17-103. Pet. App. 82a-83a.

The statute commands that no Sellinger funds may be used for sectarian purposes. Md. Code Ann., Educ. § 17-107. Pet. App. 86a. Colleges receiving aid must specify the activities for which Sellinger funds will be used and must certify that no Sellinger money will be used for sectarian purposes. Participating colleges are required to keep Sellinger funds separate from their general funds in a "special revenue account" and to certify their use only for non-sectarian purposes. Md. Regs. Code tit. 13B.01

.02.05(G)(2). Pet. App. 98a. The Program includes an audit procedure to ensure that funds are expended only as authorized for non-sectarian purposes.

The funding formula of the Sellinger Program gives no incentive toward attending a church-affiliated college, but instead is intended to aid private higher education neutrally. Of the fifteen institutions which received Sellinger funds for fiscal year 1997, twelve have no religious affiliation and three are affiliated with the Roman Catholic Church. Students enrolled in seminary or theology programs are excluded from the funding calculation for Sellinger recipients. Pet. App. 84a.

Twenty-three years ago in *Roemer*, this Court upheld the participation of four Catholic colleges in the Sellinger Program against an Establishment Clause challenge. Justice Blackmun's plurality opinion examined a broad range of factors in reaching the conclusion that aid to the Catholic colleges was permissible because they were not "pervasively sectarian." The plurality reviewed, for example, the degree of institutional autonomy from the affiliated church, sources of funding, faculty hiring and student admissions criteria, requirements of mandatory worship or theology classes, and the presence of classroom prayer. See 426 U.S. at 755-58. While various of the factors pointed in opposing directions, the plurality found that the "general picture" of the institutions supported the district court's finding that the colleges were not pervasively sectarian.

Columbia Union College. Columbia Union College is a private four-year college affiliated with the Seventh-day Adventist Church and located in Takoma Park, Maryland. Columbia Union serves a broad range of students, with 16 majors leading to a bachelor of arts and 17 leading to a bachelor of science degree. The College has been accredited since 1942 as a four year, degree-granting in-

stitution by the Middle States Association of Colleges and Secondary Schools.

The secular accrediting agency and the State of Maryland have repeatedly recognized the high quality of Columbia Union's educational programs, particularly in the field of health sciences. In addition to providing quality education, the College presents a distinct viewpoint among the wide variety of Maryland colleges and universities. As stated in the College's Bulletin: "The heart of Columbia Union College is a Christocentric vision that affirms the goodness of life, the value of earth, and the dignity of all peoples and cultures."

Proceedings Below. In January 1990, Columbia Union applied for funds under the Sellinger Program. It was (and is) undisputed that Columbia Union satisfied each of the six neutral secular statutory requirements for participation in the program. In conformance with the statute and regulations, Columbia Union pledged that "none of the state aid received under the State's Program of Aid to Non Public Institutions of Higher Education (Education Article SEC. 17-101 *et seq.*) will be used for sectarian purposes." The College likewise agreed to set up segregated "special revenue accounts" for Sellinger funds and to cooperate with the prescribed auditing procedures.

On April 14, 1992, however, the Commission ruled that Columbia Union was "pervasively sectarian" and concluded that the Establishment Clause required denial of the application based upon the factors considered in *Roemer*. The Commission adopted a lengthy report prepared by the Secretary of Education, comparing Columbia Union with the Catholic colleges already participating in the program and essentially concluding that Columbia Union was impermissibly "more religious."

On December 27, 1995, Columbia Union requested reconsideration of its application. Columbia Union be-

lieved that the Commission's refusal to treat it equally by reason of religious expression and practice on campus had become indefensible in light of this Court's then-recent decision in *Rosenberger v. Rector and Bd. of Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). On January 22, 1996, however, the Commission notified Columbia Union that unless the nature and practices of Columbia Union had changed very substantially since 1992, there would not be any point in reapplying for aid. Pet. App. 57a.

In June 1996, Columbia Union filed this suit against the members of the Commission in their official capacities, seeking declaratory and injunctive relief for constitutional and statutory violations. As part of preliminary proceedings before the district court, Columbia Union submitted a new application for Sellinger funds on November 12, 1996, requesting \$806,079 for programs in mathematics, computer science, clinical laboratory science, respiratory care, and nursing. The College provided voluminous documentation concerning its course offerings and other aspects of its campus life. Commission officials agreed that the College had provided sufficient information fully to evaluate its application. They disclaimed any desire for direct inspections or interviews at the College, based on their concern that such measures might lead to problems of "entanglement" under the Establishment Clause. Pet. App. 105a.

On December 10, 1996, the Commission circulated a report prepared by the Secretary of Education recommending denial of funding. Pet. App. 103a-131a. The next day, the Commission convened a meeting. Following brief presentations by the Secretary's office and the College, the Commission voted with one dissent to deny funding and adopt the Secretary's Report, again finding that Columbia Union was "pervasively sectarian." Pet. App. 129a. In adopting the same Report, the Commis-

sion reaffirmed Sellinger grants to other church-affiliated colleges: Loyola College, Mount St. Mary's College, and the College of Notre Dame, three of the colleges whose funding was upheld in *Roemer*. Pet. App. 131a.

On December 24, 1996, the College filed an Amended Complaint, again alleging that the Commission's discriminatory denial of funding violated Columbia Union's rights of Free Speech, Free Exercise of Religion, and Equal Protection. Both parties filed cross-motions for summary judgment, agreeing that no material facts were in dispute. The district court entered summary judgment in favor of the Commission and against Columbia Union.

The district court held that the Establishment Clause prohibited funding on grounds that the College is pervasively sectarian. The court found that religion was so pervasive at Columbia Union that its secular and religious aspects were "inextricably intertwined," so that its secular functions could not be separated from its religious ones. Applying *Roemer*, *Hunt v. McNair*, 413 U.S. 734 (1973) and *Bowen v. Kendrick*, 487 U.S. 589 (1988), the court held that to allow Columbia Union to participate in the Sellinger Program would violate the Establishment Clause. Pet. App. 61a.

The district court reviewed in detail its assessment of Columbia Union under the numerous factors mentioned in the *Roemer* plurality opinion, which had upheld aid to the Catholic colleges. The court held that Columbia Union was not "characterized by a high degree of institutional autonomy" because it received financial aid from the Seventh-day Adventist Church, and had a high proportion of Church members on its board of trustees. The court admitted that, in this regard, the College was less sectarian than colleges allowed to receive aid in *Hunt* and *Tilton v. Richardson*, 403 U.S. 672 (1971), but nonetheless found that this factor cut against funding. Pet. App. 62a-63a.

The district court found fault with Columbia Union's requirement that "traditional" (18-24 year old) students attend weekly worship services. The district court also expressed its concern that mandatory theology courses might "be devoted to deepening students' religious experiences in the Seventh-day Adventist faith, rather than to teaching theology as an academic discipline." Pet. App. 64a-65a. The district court acknowledged that this had also been the case in *Roemer* itself, but inexplicably counted this factor against Columbia Union. *Id.* 64a-65a.

The district court likewise supported its finding that the College was pervasively sectarian by finding that descriptions of academic departments in the College Bulletin were "replete with references to religion." The district court found that Columbia Union must be denied funding because "the business department's goal, in addition to graduating students with the requisite technical competence and preparedness, is to instill students with 'an approach to people, work, and life that demonstrates outstanding Christian values and ethics.'" Pet. App. 65a-66a.

Finally, the district court concluded that faculty hiring and admission decisions do not appear to be made "without regard to religion." Pet. App. 66a. Similarly, the district court found fault with the fact that 80% of Columbia Union's traditional students and 20% of its evening students were Seventh-day Adventists. (Interestingly, the district court ignored the fact that fewer than half of Columbia Union's total graduates are Church members.) *Id.* Again, the district court counted this factor against Columbia Union notwithstanding the fact that the Catholic colleges granted funding admittedly had even higher percentages of Catholic students.

Having found that Columbia Union was "pervasively sectarian" under the *Roemer* factors, the district court rejected Columbia Union's contention that it could nonetheless be treated equally in light of this Court's more

recent cases such as *Rosenberger, Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), and *Agostini v. Felton*, 117 S. Ct. 1997 (1997). The district court assumed, without deciding, that the Commission's discriminatory treatment of Columbia Union violated the Free Speech and Free Exercise Clauses, but held that complying with the Establishment Clause was a compelling interest that would justify violation of the Free Speech and Free Exercise Clauses.

On appeal, the Fourth Circuit held that it must first determine whether the exclusion of Columbia Union from the Sellinger Program violated its Free Speech, Free Exercise, and Equal Protection rights.¹ The court of appeals held that *Rosenberger* governed this question and that Columbia Union had a First Amendment right to participate in the Sellinger Program:

The Sellinger Program similarly infringed on Columbia Union's Free Speech rights by establishing a broad grant program to provide financial support for private colleges that meet basic eligibility criteria but denying funding to Columbia Union solely because of its alleged pervasively partisan religious viewpoint.

Pet. App. 8a.

The court of appeals concluded, however, that in light of "the direct applicability of *Roemer*," allowing a pervasively sectarian college to participate in the Sellinger Program would violate the Establishment Clause. Citing dicta from this Court's cases, the court below held that avoiding this Establishment Clause violation was a compelling governmental interest that was sufficient to "justify an infringement on Columbia Union's free speech rights."

¹ The court of appeals noted that these claims are to be considered as a single constitutional inquiry. Pet. App. 6a n.1, citing *Rosenberger*, 515 U.S. at 827; *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 389 (1993); *Widmar v. Vincent*, 454 U.S. 263, 266 (1981).

Pet. App. 9a-10a. In so holding, the Fourth Circuit adopted precisely the mode of analysis that led to this Court's reversal of that court's decision in *Rosenberger* itself.

The court of appeals rejected Columbia Union's arguments that this Court's more recent precedents indicated that Columbia Union's participation in the Sellinger Program was permissible even if the College were found to be pervasively sectarian. App. 10a-22a. The court noted that, absent direct overruling by this Court, it is not proper for a court of appeals to conclude that more recent Supreme Court cases have "by implication," overruled earlier precedent. Pet. App. 12a-13a, citing *Agostini*, 117 S. Ct. at 2017; *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

The panel found that these cases could be distinguished based upon the fact that in those cases aid had passed through the fingers of a student or independent agency prior to flowing to a pervasively sectarian institution, while the Sellinger Program pays funding directly to institutions, albeit under a mathematical formula based upon the number of students choosing to attend the institution. Pet. App. 13a-15a (distinguishing *Witters*). The panel acknowledged that *Agostini* directly contradicted the *Roemer* dicta that "no state aid at all" may go to pervasively sectarian institutions. Pet. App. 15a. It nonetheless distinguished *Agostini* on grounds that there aid did not flow "directly to the coffers of religious schools." Pet. App. 16a. Similarly, the court found *Rosenberger* distinguishable on the ground that public funds were paid to a printer to offset the religious organization's costs, rather than being paid directly to the organization. Pet. App. 18a.

The court of appeals next turned to the application of *Roemer's* "pervasively sectarian" analysis to Columbia

Union. Notwithstanding the fact that neither the Commission nor Columbia Union believed there were any facts in dispute or that any further discovery was appropriate, the panel found that the record examined in detail by the district court was insufficient to resolve the case. On each of the relevant factors, the panel found that there was not sufficient evidence to make a determination without further factual investigation. Pet. App. 25a-33a.

The majority emphasized that evaluation of whether Columbia Union was pervasively sectarian must be an "intensely factual" determination requiring "a full and complete factual record." Pet. App. 34a. Taking note of procedures that had been followed below in a number of this Court's cases in the 1970's, the panel indicated the necessity of "holding lengthy evidentiary hearings and making numerous factual findings," reviewing "massive testimony and exhibits," "a record of thousands of pages, compiled during several weeks of trial," and other similar procedures. The panel held that while the district court had considered the written record, "it *did not begin* to explore the college's practices pursuant to those policies." Pet. App. 34a-35a (emphasis added).

The majority stated that the necessary inquiries were "complex, elusive, and heavily fact intensive," and required direct evidence of the College's practices to "determine whether religious indoctrination pervades the institution." For example, the panel indicated the need for "faculty testimony" to determine whether the faculty "taught without fear of religious pressures in classroom presentations." Pet. App. 36a-37a. The panel demanded evidence on whether religious motivations had been considered during faculty hiring and student admissions. Pet. App. 30a-31a. Over the objection of both Columbia Union and the State, the panel demanded investigation and factfinding on whether the "school crafts its teachings based on religious principles of the Seventh Day Adven-

tist Church" and whether "the college's religious mission impinged too greatly on its academic freedom." Pet. App. 28a-29a, 37a.

Chief Judge Wilkinson dissented. At the outset, he noted his conclusion that the neutrality principle reflected in this Court's decisions such as *Walters*, *Rosenberger*, and *Agostini* would allow participation by Columbia Union in the Sellinger Program. Judge Wilkinson acknowledged, however, that he did not "write on so clean a slate," since this Court in *Agostini* and elsewhere has admonished courts of appeals not to find that prior precedents have been "implicitly" overruled. Given the fact that *Roemer* involved the exact same funding program at issue here, Judge Wilkinson concluded that application of *Roemer*'s pervasively sectarian analysis was compelled absent further direction from this Court. Pet. App. 47a.

As for the investigation ordered by the panel, however, Judge Wilkinson argued that the result did not serve Establishment Clause values, but in fact threatened them:

The majority sets the stage for what should prove to be a relentless inquisition into the religious practices of Columbia Union, its teachers, and its students. To obtain funding, Columbia Union will have little choice but to mold itself to an exhaustive template of "nonsectarianness," jettisoning in the process many of the beliefs and practices that it holds most dear. For these reasons, I believe the result reached by the majority is not only unnecessary, but also threatening to important values inherent in the First Amendment's Speech and Religion Clauses.

Pet. App. 38a. The dissent also noted that the holding was certain to "increase the administrative costs associated with educational programs like Maryland's." Pet. App. 50a. Moreover, the inquiry mandated by the majority would encourage religiously affiliated colleges to "disown their own religious character in order to gain

funding," contrary to this Court's instructions in other Establishment Clause cases:

The scrutiny the majority now demands will encourage them to disown their own religious character in order to gain funding. The result is an Establishment Clause jurisprudence that, far from maintaining government neutrality toward religion, is a ballista, affirmatively attacking an institution's religious foundation.

Pet. App. 51a.

In a petition for rehearing and suggestion for rehearing in banc, Columbia Union objected to the unexpected and intrusive remand ordered by the panel majority, contending that such an investigation itself violated the Establishment Clause. The court of appeals denied rehearing and denied rehearing in banc. Pet. App. 77a-79a. The district court stayed any conduct of further discovery so that Columbia Union could file this Petition. Pet. App. 75a-76a.

REASONS FOR GRANTING THE PETITION

Arguments can be made for both neutrality and separationism as approaches to the Religion Clauses, but the result below offers the worst of all worlds. A command—over the objections of both parties—that every private college funding program must involve intrusive investigations into an institution's "religiosity" can only create uncertainty and expense for colleges and state officials. The result below violates several commands of the First Amendment: it mandates discrimination and hostility toward religion in general; it involves forbidden intrusion by courts into matters of religion, it fosters discrimination among different religions; and it puts the force of government funding behind an incentive to disavow religious belief.

The Court should grant certiorari in order to clarify its First Amendment jurisprudence, and make clear that where a funding program is neutral toward religion, provides funding on the basis of student attendance decisions rather than governmental discretion, and contains safeguards to ensure that program funds are used for secular program purposes, the "pervasively sectarian" inquiry pursued below is simply unnecessary. Rather than focus upon technicalities that are unrelated to the nature and purposes of the program at issue, the Court should return the focus of the analysis to the substantive First Amendment values at stake. None of those values requires the discrimination against Columbia Union called for by the court of appeals.

I. THE COURT OF APPEALS' REQUIREMENT OF INTRUSIVE FACTFINDING CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND VIOLATES THE ESTABLISHMENT CLAUSE

The extensive investigation into religious practice at Columbia Union ordered by the panel majority below is prohibited by the Free Speech, Free Exercise, and Establishment Clauses. The opinion below reflects confusion and conflict among the courts of appeals that only this Court can correct.

A. The Opinion Below Mandates an Impermissible Judicial Intrusion Into Matters of Religion

This Court has held that "[i]t is not only the conclusions that may be reached by [a government inquiry] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). The religious investigation ordered below cannot be reconciled with the Court's decisions. Warnings against formulating legal

"tests" that entangle church and state appear in numerous Establishment Clause cases.²

Indeed, the inquiry ordered below is precisely what this Court has held in earlier cases that the Establishment Clause *prohibits* due to excessive entanglement. For example, in *New York v. Cathedral Academy*, 434 U.S. 125, 132-33 (1977) the Court said in the context of discussing an aid program's auditing procedures:

But even if such an audit were contemplated, we agree with the appellant that this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in

² See *Rosenberger*, 515 U.S. at 844-45 (1995) (cautioning a state university to avoid a policy that required officials to distinguish between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); *Jimmy Swaggart Ministries v. California Board of Equalization*, 493 U.S. 378, 396-98 (1990) (cautioning against making distinction between "core" religious practices and those "peripheral" to the faith); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) and *id.* at 344-45 (Brennan, J., concurring) (government should not attempt to divine which ecclesiastical appointments are sufficiently related to the "core" of a religious organization to merit exemption from statutory duties); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (tax officials should avoid potential entangling inquiry into religious practice); *Widmar v. Vincent*, 454 U.S. 263, 269-70, 272 n.11 (1981) (rejecting suggestion that Court was required to distinguish between religious "speech" and religious "worship" and exclude the latter from public fora because it would embroil university authorities, and eventually courts, in parsing the meaning of religious words and events).

support of a claim. And to decide the case, the Court of Claims would be cast in the role of arbiter of the essentially religious dispute.

The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once.

Id. at 132-33.

The cases discussed above cannot be squared with the Fourth Circuit's application of the "pervasively sectarian" test. The district court will have no choice but to delve into questions of whether teachers' and students' thoughts, words, and deeds are motivated by religious thoughts or principles, or by secular principles that happen to coincide with religious ones. *Cf.* Pet. App. 32a. If a faculty member exhorts his students to strive for honesty and tolerance of diverse cultures, does this count toward "pervasive sectarianism" because it is consistent with church teaching? Does it matter whether the teacher's motivation for promoting these values was religious? Is he to be cross-examined to find out?

These are matters over which federal courts are not qualified to make a judgment. Given the amorphous nature of the inquiry, it is impossible for anyone involved to have confidence in an "objective" outcome. It is one thing for state authorities to investigate the quality of education as accreditation standards demand, but it is quite another for a civil authority to undertake an investigation and draw conclusions about an institution's religiosity.

Given the confusion in the precedents, it is not surprising that the decision below conflicts with those of other courts of appeals. Compare with the decision below the Sixth Circuit's opinion in *Hartmann v. Stone*, 68 F.3d

973 (6th Cir. 1995), analyzing the Army's exclusion from a "preferred" day-care provider program of day-care facilities allowing grace before meals, Bible stories, and similar activities. Notwithstanding the fact that approval under the program qualified a facility for receipt of cash meal reimbursements from the U.S. Department of Agriculture, the Sixth Circuit held that the Army's regulations violated the Free Exercise Clause, and were not justified by any Establishment Clause need to secularize Army-approved day-care facilities. The court thus invalidated regulations that "require the Army to determine exactly how much religion is too much, what is substantive about particular religions and what is merely educational, and when a Provider is using a religious symbol in a 'proselytizing manner.'" *Id.* at 981-82.

Similarly, other courts of appeals have held that civil courts are *without jurisdiction* to undertake intrusive inquiries into matters of religion. In *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996), the court addressed an employment discrimination claim brought over the denial of tenure to a professor of canon law at a university affiliated with the Roman Catholic Church. Although the university's denial of tenure was explicitly based upon *non-ecclesiastical* grounds of scholarship quality, the court of appeals nonetheless held that the inquiry into hiring decisions required by the case was beyond the jurisdiction of a federal court under the Establishment and Free Exercise Clauses.

The D.C. Circuit reached this conclusion despite the fact that it found the eradication of discrimination to be a compelling governmental interest of "the highest order." *Id.* at 460. The court stated:

In this case, the EEOC's two-year investigation of Sister McDonough's claim, together with the extensive pre-trial inquiries and the trial itself, constituted an impermissible entanglement with judgments that

fell within the exclusive province of the Department of Canon Law as a pontifical institution. *See Rayburn*, 772 F.2d at 1171 (noting that a Title VII action is a "potentially . . . lengthy proceeding" that could subject church personnel and records to subpoena, discovery, and cross-examination). This suit and the extended investigation that preceded it has caused a significant diversion of the Department's time and resources. Moreover, we think it fair to say that the prospect of future investigations and litigation would inevitably affect to some degree the criteria by which future vacancies in the ecclesiastical faculties would be filled. Having once been deposed, interrogated, and haled into court, members of the Department of Canon Law and of the faculty review committees who are responsible for recommending candidates for tenure would do so "with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the . . . needs" of the Department. *Id.*

These conclusions are a sufficient basis for affirming the district court's dismissal of this case under the Establishment Clause.

83 F.3d at 467. It is difficult to imagine analysis more at odds with the panel majority below. The Court should grant certiorari to resolve the conflict.

B. The Result Below Discriminates Among Religions

One of the starkest facts in this case is that Maryland's Catholic colleges have for twenty-three years received Sellinger funding without any investigation or controversy, while an application by a Seventh-day Adventist college was immediately greeted with inquest and rejection. By allowing funding only to colleges which, while religiously affiliated, are in accord with notions of the "permissibly religious" as set forth in the twenty-three year old *Roemer* plurality opinion, pervasively sectarian analysis mandates

discrimination among religions. This Court has said that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also Everson v. Board of Education*, 330 U.S. 1, 15 (1947) (no state can pass laws that "prefer one religion over another").

Under the pervasively sectarian analysis—certainly as applied below—religions whose demands upon their adherents are sufficiently "loose," "progressive," or "flexible" to meet the *Roemer* test may obtain funding. Religions whose practices seem less familiar to commission members or judges—such as the practices of a minority religion like Seventh-day Adventism with its strong belief in community-based reinforcement of spiritual activity—risk appearing out of step with prevailing norms, and so being denied the rights afforded citizens of other religious persuasions. *See James Davidson Hunter, Culture Wars: The Struggle to Define America* 42-46 (1991) (discussing division of American religion between fervent "orthodox" and acculturated "progressive" groups).

Depending upon the decisionmakers' biases and predilections, some religious colleges will look "educational" while others will look "pervasively sectarian." As in this case, decisions of this sort are likely to be arbitrary, lacking in any coherent principle in which citizens can be confident. *See Lamb's Chapel*, 508 U.S. at 391 (invalidating "religious use" exclusion that allowed for the Salvation Army Youth Band and the Hampton Council of Churches while excluding other religious groups); *Rosenberger*, 515 U.S. at 850 (Opinion of O'Connor, J.) (invalidating university regulations that funded Islamic "cultural" magazine *Al-Salam* while denying funds to Christian "religious" magazine *Wide Awake*).

Such discrimination is particularly egregious where, as here, a majority, mainstream religion is preferred over a

minority, less traditional religion. *See Larson*, 456 U.S. at 245. When the Government prohibits a minority religion from engaging in activity enjoyed by "Baptists, Methodists, Presbyterian, or Episcopal Ministers, [and] Catholic priests," it engages in impermissible discrimination among religions. *See Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953). Particular scrutiny is surely appropriate where all applicants from a mainstream religion gain admittance, but the door is barred to a less prominent denomination. Columbia Union hopes its sister institutions affiliated with the Roman Catholic faith will continue to enjoy the benefits of the Sellinger Program, and seeks nothing more than equal treatment.

To include Columbia Union among the other twelve non-church affiliated colleges and three Catholic colleges that receive funding obviously would not involve "endorsement" of Seventh-day Adventism. *See Rosenberger*, 515 U.S. at 841. Yet citizens affiliated with Columbia Union and the Seventh-day Adventist Church cannot but reasonably conclude from their exclusion that they are "outsiders, not full members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (Opinion of O'Connor, J.). This result violates the First Amendment.

C. The Opinion Below Imposes Unlawful Governmental Pressure to Disavow Religious Belief and Practice

At the Commission's meeting to vote on Columbia Union's application, the College president asked this question: "If we recant, would we qualify?" As Judge Wilkinson noted in dissent, that question sums up what this case is all about. Pet. App. 55a. Application of the pervasively sectarian analysis to a college "raises the specter of governmental censorship, to ensure that all student

writing and publications meet some baseline standards of secular orthodoxy." *Rosenberger*, 515 U.S. at 844.

Perhaps even more troubling, the panel majority's analysis creates a powerful incentive to disavow religious belief. The State has no business tempting faculty and administrators with precious educational funding, if only they will soft-pedal their religious convictions. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (unlawful to condition receipt of a government benefit on surrender of a constitutional right). Given the close and contradictory analysis of the *Roemer* "factors" below, even the Catholic colleges must now worry about whether to trim and tweak their policies so as to hang on to Sellinger funding. The potential for waste, confusion, and needless government interference with the free evolution of religious doctrine can only grow. *See Karen W. Arenson, Catholic Campuses Face a Showdown on Ties to Church*, The New York Times, February 5, 1999 at A1 (discussing proposal to shift control of Catholic colleges to local bishops, require college presidents to take an oath of fidelity to the Church, and restrict faculty recruitment to "faithful Catholics").

The Court has explained that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself." *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1984). Columbia Union offers one valuable viewpoint among the many presented by private colleges in Maryland. Yet the analysis below distorts a neutral program funding a variety of educational choices into an engine of secular conformity.³

³ One recent court of appeals decision has affirmed a First Amendment right of academic freedom on the part of a public university

II. "PERVASIVELY SECTARIAN" ANALYSIS CONFLICTS WITH THIS COURT'S MORE RECENT ESTABLISHMENT CLAUSE JURISPRUDENCE, CAUSING CONFUSION ONLY THIS COURT CAN CORRECT

This case affords the Court an ideal opportunity to clarify aspects of Establishment Clause jurisprudence that have already confused lower courts, and are certain to impose cost and uncertainty on educational institutions throughout the United States. As Judge Wilkinson recognized in dissent, under the Court's "neutrality" analysis in *Rosenberger*, *Witters*, and *Agostini*, Columbia Union can participate equally in the Sellinger Program without violating any Establishment Clause principle. Under the panel majority's approach, colleges and state administrators are guaranteed a future of wasteful and unpredictable litigation. Indeed, it might be argued that *any* clear rule of decision is preferable to the arbitrary and open-ended proceedings pervasively sectarian analysis demands.

Two Justices have already questioned whether a pervasively sectarian analysis should remain part of Establishment Clause jurisprudence given the degree to which it requires close evaluation of whether "too much" religion is being practiced at an institution. See *Bowen*, 487 U.S. at 624-25 (Opinion of Kennedy, J., joined by Scalia, J.) (questioning whether pervasively sectarian is a "well-founded juridical category" and noting that the proper inquiry "in an as-applied challenge is not whether the entity is of religious character, but how it spends its

to command that one of its professors cease expounding religious ideas on university time. See *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3d Cir. 1998), cert. denied, 1999 U.S. Lexis 1094 (1999). It is ironic that at the same time the court below has held that Columbia Union has no academic freedom to pursue its own vision without the coercive prospect of losing funding given to every other qualified Maryland college.

grant.") The Court should grant certiorari to harmonize its Establishment Clause jurisprudence.

Specifically, the Court should make clear that religiously-affiliated colleges that fully meet the secular standards of a state program can receive equal treatment. Where aid is distributed according to a neutral formula that does not involve religious considerations and state decisionmakers do not make discretionary decisions about the amount of funding given to participants, and where funds are segregated into special accounts for purely secular purposes, the intrusive and constitutionally suspect "pervasively sectarian" analysis need not be undertaken at all.

The Sellinger Program's provisions conform with the substantive rationale of this Court's modern Establishment Clause cases. In *Witters*, the Court upheld extension of neutrally available vocational assistance to a blind person studying at a private Christian college to become a pastor, missionary, or youth director. The Court emphasized the neutral criteria of the program, under which aid went to religious institutions "only as a result of the genuinely independent and private choices of aid recipients," 474 U.S. at 487, under a funding mechanism that creates "no financial incentive for students to undertake sectarian education." *Id.* at 488. All this would be true if Columbia Union were given non-discriminatory access to the Sellinger Program, where eligibility is based on neutral secular criteria and funding is based not upon subjective funding decisions, but upon a mathematical student attendance formula.

The panel majority's only response was to say that *Witters* is distinguishable because their funds were paid directly to the student, who then transmitted them to the sectarian school. Pet. App. 13a-15a. Similarly, the panel distinguished *Rosenberger* by emphasizing that in that

case "no public funds flow directly to [the religious publication's] coffers" because the funds were paid to a printer. Pet. App. 18a. In light of these distinctions, the court below concluded that these later opinions could not be construed as overruling *Roemer*.

Perhaps understandably, in view of this Court's admonitions about the proper role of courts of appeals, the panel never undertook any principled analysis of *why* these distinctions might matter, or whether the substantive Establishment Clause values they serve were already met by other aspects of the Sellinger Program. Only this Court can perform that task. The Court should do so in order to clarify the law, and to relieve colleges like Columbia Union from the prospect of repeated and unpredictable theological audits.

The distinction emphasized by the panel majority—that Sellinger aid is paid directly—cannot alone provide a principled basis of decision. In *Committee for Public Education v. Regan*, 444 U.S. 646 (1980), the Court rejected this formalistic approach: "we decline to embrace a formalistic dichotomy that bears so little relationship either to common sense or the realities of school finance." As the Court explained, "none of our cases requires us to invalidate these reimbursements simply because they involve payments in cash." *Id.* at 658.⁴

It cannot be that what mattered in *Witters* was the formality of a check passing through the student's hands.

⁴ Consider how strange the formalistic jurisprudence of the court of appeals looks in terms of results. Because the checks passed through the hands of students in *Witters*, funding was allowed for Bible college study leading to a career as a pastor. This activity would not even be *eligible* for funding under the Sellinger Program. Yet funding for mathematics, computer science, and nursing programs is denied to Columbia Union because it would receive funding directly based upon a count of the students who choose to go there rather than having the same funds passed through the possession of the students. This makes no sense.

Rather, it was critical that "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients," that the program was "in no way skewed towards religion," and that the program created no "financial incentive for students to undertake sectarian education." *Id.* at 487-488.⁵

The Sellinger Program fully complies with these substantive principles. Had Maryland set up an aid program that placed the State in the position of making discretionary grants to religiously affiliated schools on a continuing, subjective, ad hoc basis, an Establishment Clause concern might be presented. Providing aid to religious schools in this way could run the risk that the State might tilt the playing field in favor of—or against—church affiliated institutions, or might be seen as endorsing religion. No such danger exists with the Sellinger Program, under which all private colleges that meet the neutral criteria of the program receive funding through an objective mathematical formula based upon the number of student credit hours provided at the institution (excluding theological or seminarian students). Md. Code Ann., Educ. § 17-103. Pet. App. 82a-83a; § 17-104. Pet.

⁵ The court below inexplicably rejected Columbia Union's contention that, even under the formalistic view that *Witters* turned on passing checks through the fingers of students, that case demonstrated that the Commission's exclusion of the College from the Sellinger Program was not "narrowly tailored" to avoid constitutional difficulty where the State could achieve the same funding results by changing its program to channel aid through the students. Pet. App. 9a. The Commission did not even advance evidence of administrative costs in making such a change, much less show a compelling interest in structuring the program in a way that needlessly excludes Columbia Union. With an inclusive alternative readily available, it cannot be correct that the most narrowly tailored approach is the *only* one that requires violating independent Free Speech and Free Exercise rights.

App. 83a-84a; Md. Regs. Code tit. 13B.01.02.04. Pet. App. 91a.

On this point, too, the decision below creates a conflict that this Court should address. In *Jackson v. Benson*, 578 N.W.2d 602 (1998), the Supreme Court of Wisconsin rejected the notion that the path taken by an aid check is more important than the substantive neutrality of the aid program as a whole. Emphasizing the neutral criteria of the school aid program at issue and the fact that the amount of funding (as here) depends upon student attendance choices, the court rejected the notion that the program was unconstitutional because "the State sends the checks directly to the participating private school and the parents must restrictively endorse the checks to the private schools." 57 N.W.2d at 618. Contrary to the court of appeals here, the court held that "the importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path." *Id.* The Court should grant certiorari to resolve the conflict.

Direct payments into the general "coffers" of a religious institution raise the risk that state funds may flow toward worship or other religious practices that serve no secular purpose. This point was recognized in *Witters*, where the court noted that "aid to a religious institution *unrestricted in its potential uses*, if properly attributable to the state, is 'clearly prohibited under the Establishment Clause.'" 474 U.S. at 489 (emphasis added). In *Rosenberger* any such concern was dealt with because state funds were paid directly to a printer for printing services as opposed to being given to the publication as a direct money payment "unrestricted in its potential uses." Justice O'Connor emphasized this point. See 515 U.S. at 850 ("financial assistance is distributed in a manner that ensures its use only for permissible purposes").

Again, under the Sellinger Program, the substantive concern served by the emphasis on the absence of a direct money payment is fully addressed. Funds never flow directly to the "coffers" of any institution. They must instead be placed in a special revenue account to be used for specified secular purposes. Md. Regs. Code tit. 13B.01.02.05(G)(2). Pet. App. 98a. An application process, pre- and post-expenditure affidavits, and post-expenditure audit procedures are in place under the Sellinger Program to ensure that no state monies are used for any religious activity. *Id.* § 13B.01.02.05.

Prior to *Agostini*, one response to all this might have been to say that the very purpose of the pervasively sectarian analysis was to determine whether an institution was one that could be "trusted" to keep aid money separated for secular uses in this way. See *Roemer*, 426 U.S. at 755 (purpose is to determine whether "secular activities cannot be separated from sectarian ones"). But *Agostini* flatly contradicted *Roemer's* statement that "no state aid at all" may go to a pervasively sectarian institution, see 117 S. Ct. at 2010-11, and conclusively rejected the *Roemer* notion that secular and sectarian activities can never be separated within a pervasively sectarian institution, *id.* at 2012; see also *Regan*, 444 U.S. at 660 (Court not willing to assume "bad faith" in the direction of funds by parochial schools).⁶ After *Agostini*, the time has come to clarify this area of the law.

The court of appeals' analysis, in which two clauses of the First Amendment are at war with one another, can-

⁶ In the same sentence in which it observed in *Agostini* that the funds at issue did not "reach the coffers of religious schools" because the program was administered by a "local educational authority," this Court approvingly cited *Regan*, in which direct money payments to pervasively sectarian schools were permitted where (as here) separate special revenue accounts were maintained. *Id.* at 2013.

not provide a unified and coherent theory of the Establishment Clause. Scholars may debate whether there should be a range of discretionary governmental action toward religion, between the floor of the Free Exercise Clause and the ceiling of the Establishment Clause. But it cannot make sense to adopt an analysis in which the floor is *above* the ceiling—where discrimination against a religious institution violates part of the First Amendment yet another part forbids equal treatment.

A “battle of the clauses” analysis based upon the form of aid risks creation of a Free Speech and Free Exercise right to funding that, ironically, will prove hollow *only* for religious groups. Should a school administrator who is hostile to a Bible Club, for example,⁷ be able to avoid the Club’s right to equal access by requiring \$100 “rent” for each meeting, then announcing that the only school group that cannot qualify for \$100 in aid to pay the rent is the Bible Club because “cash” grants are prohibited? Cf. *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997) (groups advocating lifestyles and actions prohibited by sodomy and sexual misconduct laws must have equal access to government funds). At the end of this path is a First Amendment uniquely hostile to religion.

The law need not take this direction. Application of the principles of nondiscrimination and equal treatment can bring the clauses of the First Amendment into harmony. Perhaps the principle of neutrality cannot solve every Establishment Clause problem in every context. See e.g., *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 771 (1994) (Opinion of O’Connor, J.)

⁷ See, e.g., *Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F.3d 839, 848 (2d Cir.), cert. denied, 519 U.S. 1040 (1996) (recounting school board member’s efforts to persuade district to reject all federal funds so it could avoid mandate of Equal Access Act and bar Bible Clubs).

(discussing limits of neutrality as a rule of decision in special context of symbolic displays that risk conveying message of government endorsement). But it can solve this one. The Court should address the matter before scarce administrative and educational resources are wasted in trying to comply with unsettled law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

1a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2656

COLUMBIA UNION COLLEGE,
Plaintiff-Appellant,
v.

EDWARD O. CLARKE, JR., in his official capacity as member of the Maryland Higher Education Commission; J. GLENN BEALL, JR., Honorable, in his official capacity as a member of the Maryland Higher Education Commission; DOROTHY DIXON CHANEY, in her official capacity as a member of the Maryland Higher Education Commission; DONNA H. CUNNINGHAME, in her official capacity as a member of the Maryland Higher Education Commission; JOHN J. GREEN, in his official capacity as a member of the Maryland Higher Education Commission; JAMIE KENDRICK, in his official capacity and as a member of the Maryland Higher Education Commission; TERRY L. LIERMAN, in his official capacity and as a member of the Maryland Higher Education Commission; OSBORNE A. PAYNE, in his official capacity and as a member of the Maryland Higher Education Commission; R. KATHLEEN PERINI; CHARLES B. SAUNDERS, JR., in his official capacity and as a member of the Maryland Higher Education Commission; RICHARD P. STREET, JR., in his official capacity and as a member of the Maryland Higher Education Commission; ALBERT NATHANIEL WHITING, in his official capacity and as a member of the Maryland Higher Education Commission,

Defendants-Appellees.

CHRISTIAN LEGAL SOCIETY; THE COALITION FOR CHRISTIAN COLLEGES & UNIVERSITIES; UNION OF ORTHODOX JEWISH CONGREGATION OF AMERICA; THE AMERICAN JEWISH CONGRESS; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; THE ANTI-DEFAMATION LEAGUE,

Amici Curiae.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.

Marvin J. Garbis, District Judge.

(CA-96-1831-MJG)

Argued: June 3, 1998

Decided: October 26, 1998

Before WILKINSON, Chief Judge, MOTZ, Circuit
Judge, and BUTZNER, Senior Circuit Judge.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

Columbia Union College, a four-year private liberal arts college affiliated with the Seventh Day Adventist Church, brought this action against the Maryland Higher Education Commission. Columbia Union alleged that the Commission's decision to deny it state funds under Maryland's Sellinger grant program violated the college's free speech, free exercise, and equal protection rights. Assuming that the Commission's action infringed one or more of these rights, the district court nonetheless granted sum-

mary judgment to the Commission. The court concluded that the Commission's action was justified by a compelling state interest. Specifically, the district court held that the undisputed facts demonstrated that Columbia Union is a "pervasively sectarian" institution, and so, under *Roe-mer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976) (plurality opinion), the Commission could not provide public funds to the college without violating the Establishment Clause. Because the district court erred in holding that, as a matter of law, Columbia Union is "pervasively sectarian," we vacate and remand for further proceedings consistent with this opinion.

I.

In 1971, the Maryland General Assembly statutorily created the Sellinger program to provide annual state-funded grants to qualifying private colleges, with the amount of funding determined by the number of full-time students attending the qualifying college. *See* Md. Code Ann., Educ. § 17-101 *et seq.* (1997).

To qualifying for aid under the Sellinger program, an institution must: (1) be a nonprofit private college or university established in Maryland before July 1, 1970; (2) be approved by the Commission; (3) be accredited; (4) have awarded associate of arts or baccalaureate degrees to at least one graduating class; (5) maintain one or more degreed programs in subjects other than the seminarian or theological programs; and (6) demonstrate that no Sellinger funds will be used for "sectarian purposes" including "religious instruction, religious worship, or other activities of a religious nature." *Id.* §§ 17-103, 107; Md. Regs. Code tit. 13 B, § .01.02.06(A) (Supp. 1996). So that the State can ensure institutions receiving aid under the Sellinger program continue to abide by the last requirement, those institutions must provide the Commis-

sion with annual pre- and post-expenditure affidavits detailing their intended and actual use of the funds. See Md. Regs. Code tit. 13 B, § .01.02.05 (Supp. 1996). The Commission also reserves the right to audit an institution's books and records to ensure its compliance. *Id.*

Columbia Union initially applied for Sellinger funds in 1990. Two years later, acknowledging that the College met the first five statutory eligibility requirements, the Commission denied Columbia Union the Sellinger funds on the ground, *inter alia*, that the college was "pervasively sectarian" because it lacked institutional autonomy from the Seventh Day Adventist Church, it required religious worship by its students, its religion department sought to "set the tone" for college life, religion influenced non-theology courses, and a large percentage of students and faculty were church members. The Commission concluded that to provide a state grant to Columbia Union to fund ostensibly secular educational courses would impermissibly advance religion in violation of the Establishment Clause because the college's religious mission permeated even its assertedly secular educational functions. In reaching this conclusion, the Commission heavily relied on the Supreme Court's decision in *Roemer*. There, in an earlier Establishment Clause challenge to the Sellinger program, the Court categorically announced that "no state aid at all [can] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones." *Roemer*, 426 U.S. at 755. The college did not appeal the Commission's 1992 decision.

This is where matters stood until 1995. Then, in reliance on *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), Columbia Union requested that the Commission reconsider its application for a Sellinger grant. The college requested

\$806,079 in public monies to fund the total budget of its mathematics, computer science, clinical laboratory science, and respiratory care departments and forty percent of its nursing department. Once again, the Commission rejected Columbia Union's request, stating that unless the nature and practices of the college had materially changed since 1992, it would be rejected on the same ground.

Columbia Union thereafter filed suit in federal court seeking declaratory and injunctive relief based on alleged statutory and constitutional violations. The district court dismissed the action without prejudice on the ground that it was not ripe because the college had not formally re-applied for Sellinger funds. Columbia Union agreed to reapply and the Commission agreed to review the application on an expedited basis. The parties further agreed that the Commission's review would be conducted without an administrative hearing.

On October 24, 1996, the Commission again denied Sellinger funds to Columbia Union, again citing the Establishment Clause. The Commission based its decision largely on information included in Columbia Union's publications and course descriptions, specifically noting that it did not review any "statistics" regarding how Columbia Union's policy actually affected student admissions and faculty hiring.

Two months later, Columbia Union filed an amended complaint alleging statutory and constitutional claims. The statutory claim was based on the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb *et seq.* (West 1994) (RFRA), and the district court dismissed it in light of *City of Boerne v. Flores*, 117 S. Ct. 2157, 2160 (1997) (invalidating RFRA). See *Columbia Union College v. Clarke*, 988 F. Supp. 897, 900 (D. Md. 1997). On the college's constitutional claims—asserted denial of

free speech, free exercise, and equal protection rights—the district court granted summary judgment to the State. *Id.* at 904-06. The court assumed for purposes of summary judgment that the Commission's denial of funding violated one or more of Columbia Union's constitutional rights, but held any violation justified by a compelling state interest—compliance with the Establishment Clause. *Id.* The court held, as a matter of law, that (1) the Establishment Clause prohibited any state from directly funding a "pervasively sectarian" institution and (2) Columbia Union is a "pervasively sectarian" institution. *Id.* at 900-01. Columbia Union noted a timely appeal.

II.

We first address Columbia Union's contention that the Commission's decision to deny the college Sellinger funds infringed its First Amendment right to free speech.¹ Only if the denial, absent any Establishment Clause concerns, encroached upon the college's free speech right need we reach the Establishment Clause question.

The college maintains that *Rosenberger* "governs" and requires a holding in its favor. The State's sole response is that any curtailment of Columbia Union's speech is justified by a compelling state interest—avoiding a violation of the Establishment Clause. Although the need to comply with Establishment Clause requirements certainly justifies a free speech infringement, *see infra* § III, it does not eliminate the infringement. Accordingly, Maryland's response does not answer the question of whether denial

¹ As noted above, Columbia Union also alleges that this denial violated its free exercise and equal protection rights. A court considers these claims as one constitutional inquiry. *See, e.g., Rosenberger*, 515 U.S. at 827; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 389 (1993); *Widmar v. Vincent*, 454 U.S. 263, 266 (1981).

of Sellinger funding in the first instance curtails Columbia Union's free speech right.

Rosenberger, however, provides a good deal of guidance on this question. Consistent with prior Supreme court precedent, it teaches that generally the First Amendment forbids the government from discriminating for or against private speech because of the content or viewpoint of the speech. *See Rosenberger*, 515 U.S. at 828. Even where the government subsidizes, rather than penalizes, private speech it usually cannot "favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

However, the government, provided it does not violate the Establishment Clause, may selectively aid certain kinds of private speech and thereby "regulate the content of what is or is not expressed" in two clearly defined instances. *Rosenberger*, 515 U.S. at 833. First, the government may provide assistance to certain viewpoints when "it enlists private entities to convey its [the government's] own message." *Id.*; *see also Rust v. Sullivan*, 500 U.S. 173, 198-99 (1991). Second, the government may appropriate public funds "to promote a particular policy of its own." *Rosenberger*, 515 U.S. at 833. This case presents neither of those two circumstances. Maryland does not seek, through the Sellinger program, to enlist private colleges either to convey some message for the state or to promote a particular state policy.

Rather, Maryland provides Sellinger grants to "support[] private higher education generally, as an economic alternative to a wholly public system." *Roemer*, 426 U.S. at 754 (emphasis added). Thus, the State funds a broad array of qualifying private colleges to encourage alterna-

tive sources of higher education. *Rosenberger* teaches that "viewpoint-based restrictions are [not] proper" when the government "expends funds to encourage a diversity of views." 515 U.S. at 834; see also *Lamb's Chapel*, 508 U.S. at 394 (public school facilities made widely available after hours cannot be denied to a group merely because of its religious views); *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (public university may not deny religious student group access to facilities made available to all other non-religious student groups); cf. *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2178 (1998) (government permitted to selectively subsidize artists because "competitive" funding process means "[g]overnment does not indiscriminately 'encourage a diversity of views from private speakers'" (quoting and distinguishing *Rosenberger*, 515 U.S. at 834)).

For these reasons, we agree with Columbia Union that *Rosenberger* controls the resolution of its free speech claim. In *Rosenberger* a public university encroached upon the free speech rights of a student magazine, *Wide Awake*, when it paid an outside contractor to service the printing needs of student publications but refused to provide this benefit to *Wide Awake* "solely on the basis of its religious viewpoint." *Rosenberger*, 515 U.S. at 837. The Sellinger program similarly infringed on Columbia Union's free speech rights by establishing a broad grant program to provide financial support for private colleges that meet basic eligibility criteria but denying funding to Columbia Union solely because of its alleged pervasively partisan religious viewpoint.

As in *Rosenberger*, "[i]t remains to be considered whether the [free speech] violation following from the [government's] action is excused by the necessity of complying with the Constitution's prohibition against state

establishment of religion." *Id.* Accordingly, as the *Rosenberger* Court did, we now "turn to that question." *Id.*

III.

To justify an infringement on Columbia Union's free speech rights, Maryland must demonstrate that its decision to deny funding to Columbia Union "serve[s] a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270. Undoubtedly, as Columbia Union properly conceded at oral argument, the need to comply with the Establishment Clause constitutes such an interest. *Id.*; *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995); *Lamb's Chapel*, 508 U.S. at 394; see also *Rosenberger*, 515 U.S. at 838-39.²

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court enunciated a three-part test to determine whether government action violates the Establishment

² If the award of state funds to pervasively sectarian institutions violates the Establishment Clause, denial of Sellinger funds to Columbia Union is narrowly tailored to meet this interest. Columbia Union contends that a more narrowly tailored solution would be to order Maryland to amend its Sellinger grant program so that, rather than fund colleges directly, the State would provide such funds to students to be used at any qualifying college. Even assuming a federal court has the power to order the sovereign state of Maryland to amend a duly enacted state statute, we are at a loss for how this remedy is more narrowly tailored than simply denying funds to the one affected institution and permitting the statute, which otherwise operates within the bounds of the Constitution, to stand. Action taken to remedy an "evil" will be considered "narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (internal quotation marks omitted). Here, the asserted evil is violation of the Establishment Clause, which can be cured by simply denying funds to Columbia Union. Denying funding to all private colleges and instituting a new funding scheme would have far broader, rather than narrower, consequences.

Clause. To satisfy the prohibition against conduct that establishes religion, government action must (1) have a secular purpose; (2) have as its "primary effect . . . one that neither advances nor inhibits religion"; and (3) "not foster an excessive government entanglement with religion." *Id.* at 612-13 (internal quotation marks and citations omitted). Recently, the Court reaffirmed the importance of the "purpose" prong and concluded that the "effect" and "entanglement" prongs rightly comprise a single "effect" inquiry. *Agostini v. Felton*, 117 S. Ct. 1997, 2010, 2015 (1997). The State does not suggest that the Sellinger program fails to serve a secular purpose—i.e., supporting higher education generally—and so satisfies the first prong of the *Lemon* test. Thus, the only Establishment Clause issue presented in this case is whether directly granting state funds to Columbia Union would have the impermissible effect of advancing religion.

A.

We begin our inquiry by recognizing the direct applicability of *Roemer*, 426 U.S. at 736. In that case, four Maryland taxpayers challenged the constitutionality of the very grant program at issue here, *id.* at 744, and, as here, the purpose prong of the *Lemon* test was "not in issue," *id.* at 754. The taxpayers alleged that the State's provision of state funds—Sellinger grants—to private colleges affiliated with the Roman Catholic Church had the primary effect of advancing religion in violation of the Establishment Clause. *Id.* In a plurality opinion, the Supreme Court held that the state could provide direct government funds to support the general secular educational activities of the church-affiliated colleges because religion did not so permeate those colleges that their religious and sectarian roles were indivisible. *Id.* at 755-59. Although the colleges unquestionably were affiliated with

a church, they were not, the Court held, "pervasively sectarian," so the direct grant of government funds to them did not violate the Establishment Clause. *Id.* at 758-59.

The *Roemer* Court carefully distinguished a "pervasively sectarian" institution from a "religiously affiliated" one. A "pervasively sectarian" college is unable to separate its secular, educational mission from sectarian indoctrination. *Id.* Because "religious and secular functions [are] inseparable" at a pervasively sectarian college, *id.* at 750, no safeguard can ensure that direct monetary aid, even if designated to fund the school's secular functions, will not aid its religious mission. *See id.* at 758 n.21 (In a "pervasively sectarian" college, "because of the institution's general character . . . courses could not be funded without fear of religious indoctrination."). By contrast, an institution *not* pervasively sectarian but simply "affiliated" with a religious organization could pursue purely secular purposes. Government assistance to such a religious institution—directed only to those purely secular purposes—would not impermissibly advance religion. Thus, the church-affiliated, but not pervasively sectarian, colleges in *Roemer* could receive money grants for secular instruction because they could separate secular from religious activities and demonstrate that government funds would flow only to secular educational activities. *Roemer*, 420 U.S. at 762.

The *Roemer* Court explained that when providing funds to private institutions "[n]eutrality is what is required" from the states, meaning "[t]he state must confine itself to secular objectives, and neither advance nor impede religious activity." *Id.* at 747. The Court cautioned, however, that "a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity." *Id.* For example, "[t]he State may not . . . pay for what is actually a reli-

gious education" by providing money grants to a pervasively sectarian college, even though the state "purports to be paying for a secular [education], and even though it makes its aid available to secular and religious institutions alike." *Id.* Although *Roemer* solely involved direct money grants, the Court declared, in dicta, that "no state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones." *Id.* at 755 (emphasis added) (citing *Hunt v. McNair*, 413 U.S. 734 (1973)).

The Supreme Court has never expressly overruled *Roemer*. Columbia Union does not and cannot claim to the contrary. What Columbia Union does contend is that recent Supreme Court cases have effectively overruled *Roemer*. The college asserts that these cases "establish" that it "may properly participate in the Sellinger program *even if* [it] were found to be pervasively sectarian." Reply Brief at 9 (emphasis in original). Before addressing these cases, we note the limits of our role as an intermediate appellate court in determining the continued viability of Supreme Court precedent. The Supreme Court has recently and unequivocally "reaffirmed" that lower courts are *not* to "conclude" that the Court's "more recent cases have, *by implication*, overruled [its] earlier precedent." *Agostini*, 117 S. Ct. at 2017 (emphasis added). Rather,

if a precedent of [the Supreme] Court has *direct* application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the line of cases which *directly controls*, leaving to [the Supreme] Court the prerogative of overturning its own decisions.

Id. (emphasis added) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). Thus, in *Agostini*, the Supreme Court, even

though it overruled its prior precedents, commended the district court and court of appeals for following those very precedents "unless and until" the Supreme Court itself "reinterpreted the binding precedent." *Id.*

We have consistently adhered to the *Agostini* directive, see, e.g., *West v. Anne Arundel County*, 137 F.3d 752, 760 (1998), and will not do otherwise here. *Agostini* particularly resonates here because, as in *Agostini*, this case involves an Establishment Clause challenge to a specific grant program previously addressed by the Court. Indeed, Columbia Union itself recognizes that "[t]he fact that *Roemer* was decided in relation to the very program at issue here necessarily calls upon this [c]ourt to be careful in evaluating the effect of later cases." Reply Brief at 20. Thus, "unless and until" the Supreme Court has clearly overruled *Roemer*, we must apply its holding, which "directly controls" this case. *Agostini*, 117 S. Ct. at 2017.

B.

In arguing that the Court has overruled *Roemer*, Columbia Union principally relies on *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), *Agostini*, and *Rosenberger*. The college claims that these cases have nullified *Roemer's* holding that the Establishment Clause permits direct state money grants to the general secular educational programs of religious colleges only if those colleges are not pervasively sectarian. Although these cases unquestionably undermine the *Roemer* dicta that "no state aid at all" is permissible to a pervasively sectarian institution, we can find nothing in them or any other Supreme Court precedent that eviscerates *Roemer's* holding regarding direct money grants.

In *Witters*, the Supreme Court held that the Establishment Clause did not prohibit a blind student from using funds that would be awarded *to him*, pursuant to a state

vocational assistance grant, to finance pastoral studies at a Christian college. *Witters*, 474 U.S. at 488-89. The Court refused to find the grant was an "impermissible 'direct subsidy'" to a religious school because although state aid "ultimately flow[ed] to religious institutions" this was "only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488. Prospective individual students—not institutions—were the only parties eligible to receive the state grants and so "the decision to support religious education [wa]s made by the individual *not by the State*." *Id.* (emphasis added); see also *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) ("By acording parents freedom to select a school of their choice," providing sign language interpreter to deaf student attending Catholic school was "only as a result of the private decision of individual parents . . . [and] cannot be attributed to state decisionmaking.").

Columbia Union contends that, because the amount of Sellinger funds awarded to a given college depends on the number of students enrolled, Sellinger grants are based on the same student "private choices" that rendered the *Witters* grant constitutional. We are not persuaded. The state aid at issue here, in contrast to that in *Witters*, reaches a religious school solely as a result of a decision "made by the state" *not* the student. *Witters*, 474 U.S. at 488. Columbia Union would receive such funds as part of a general government program that distributes benefits to qualifying institutions directly. Cf. *Witters*, 474 U.S. at 488 ("any aid ultimately flowing to the Inland Empire School of the Bible" is not "resulting from a state action") (emphasis in original); *Zobrest*, 509 U.S. at 10; *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 781 (1973) ("the fact that aid is disbursed to parents rather than schools" is a factor weighing against finding state program violates the Estab-

lishment Clause). Institutions, not students, apply for Sellinger funds, and the State determines the eligibility of institutions, not students, for the funds. The State then pays such funds directly to an institution which is, in turn accountable to the State for the manner in which it spends such funds. See Md. Regs. Code tit. 13 B, § .01.02.05. Although the amount of Sellinger funds given to an institution is tied to the number of students attending it, the decision to fund the institution in the first instance is exclusively the State's.

Nor can the aid here be said to reach the college as an incidental benefit, as it did in *Witters*. Rather, the college is the "primary beneficiar[y]" of this direct aid, and the student, "to the extent [he] benefit[s] at all from" the Sellinger grants, is the "incidental beneficiar[y]." *Zobrest*, 501 U.S. at 12; cf. *id.* ("Disabled children, not sectarian schools, are the primary beneficiaries" of services provided under IDEA; "to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries."). *Witters*, a case confined to those situations where student choice, not state decisionmaking, results in an incidental benefit to a religious institution, does not overrule *Roemer* or alter its applicability to the case at hand.

Nor does *Agostini* overrule the *Roemer* holding. To be sure, like *Witters*, *Agostini* prohibits a court from concluding that any and all state aid to a pervasively sectarian institution impermissibly advances religion, and so to that extent is contrary to the broad *Roemer* dicta. *Agostini*, 117 S. Ct. at 2010-11; cf. *Roemer*, 426 U.S. at 747 ("no state aid at all" is permissible). But *Agostini* does not undermine the holding in *Roemer* that the Establishment Clause permits the state to provide direct money payments ("noncategorical in nature") to a church-affil-

iated college to fund its secular educational purposes only if the college is not so “pervasively sectarian that secular activities cannot be separated from sectarian ones.” *Roemer*, 426 U.S. at 740.

In *Agostini*, the Court overruled *Aguilar v. Felton*, 473 U.S. 402 (1985), and, in part, *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), expressly rejecting the general proposition, stated in *Ball* and *Aguilar* (and *Roemer*), that “all government aid that directly aids the educational function of religious schools is invalid.” *Agostini*, 117 S. Ct. at 2011. The *Agostini* Court held that the Establishment Clause does *not* bar the government from sending public school teachers to provide remedial Title I services to disadvantaged children to “supplement[]” the core curriculum of “pervasively sectarian” grade schools. *Id.* at 2008, 2013. In reaching this conclusion, the Court analogized the remedial services before it to the vocational grant in *Witters* and the sign-language interpreter in *Zobrest*, reasoning that remedial instruction provided to “eligible recipients” also reaches the school “only as a result of the genuinely independent and private choices of” students or their parents. *Id.* at 2012 (quoting *Witters*, 474 U.S. at 487). Thus, such aid flowing to pervasively sectarian institutions, as a result of parents’ choice to send these qualifying students to such a school, did not impermissibly advance religion. *Id.* at 2012.

In the face of objections in a vigorous dissent, the *Agostini* Court carefully explained the limits of its holding. First, it pointed out that the facts before it did not involve a situation (like our case or *Roemer*) in which aid flows directly to “the coffers of religious schools” for services provided “on a school-wide basis.” *Id.* at 2013. The *Agostini* Court further explained that providing remedial services did not impermissibly advance the schools’ reli-

gious educational mission because those services were “supplemental to the regular curricula” taught to all students; Title I aid did not “supplant” or “reliev[e]” sectarian schools of costs they otherwise would have borne in educating their students.” *Id.* (quoting *Zobrest*, 509 U.S. at 12); see also *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 656 (1980) (upholding reimbursement to parochial schools for costs to administer and grade state-sponsored, state-mandated standardized testing that were separate and apart from, and thus supplemental to, the religious school’s educational program, and not used for “religious educational purposes”).

Thus, *Agostini*, the Court’s most recent treatment of the Establishment Clause in the school funding context, holds that government aid flowing to even a pervasively sectarian institution does not impermissibly advance religion *if* it reaches the institution as a result of private independent choices of the individual rather than state decisionmaking, and *if* it “supplements” rather than “supplant[s]” the college’s core educational functions. *Agostini*, 117 S. Ct. at 2013. But *Agostini* does *not* hold that government funding that directly flows to “the coffers of [a pervasively sectarian] religious school[]” to fund the entire budget for many of the college’s core educational courses would survive an Establishment Clause challenge. *Id.* *Agostini*, therefore, does not disturb the central teaching of *Roemer* that when a college is so pervasively sectarian that its religious mission “permeates” its educational functions, the government cannot provide direct money grants even to fund the college’s secular subjects because “religious and secular function [a]re inseparable.” *Roemer*, 426 U.S. at 750.

Finally, Columbia Union’s suggestion that *Rosenberger* overrules *Roemer* is particularly puzzling. As outlined

above, *Rosenberger* clearly provides precedent helpful to Columbia Union on its free speech claim. But just as clearly, the *Rosenberger* Court's treatment of the Establishment Clause issue provides no support for Columbia Union's contention that it overrules *Roemer*. In fact, the *Rosenberger* Court took particular pains *not* to overrule *Roemer*, but to carefully distinguish it, explaining:

The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that *we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions, citing Roemer The error is not in identifying the principle but in believing that it controls this case.* Even assuming that WAP is no different from a church and that its speech is the same as the religious exercises conducted in *Widmar* (two points much in doubt), the Court of Appeals decided a case that was, in essence, not before it, and the dissent would have us do the same. *We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity. Neither the Court of Appeals nor the dissent, we believe, takes sufficient cognizance of the undisputed fact that no public funds flow directly to WAP's coffers.*

Rosenberger, 515 U.S. at 842 (emphasis added; citations omitted).

The *Rosenberger* Court expressly found that *Roemer* did not apply in a case where the University provided an "incidental," indirect benefit (*i.e.*, printing services) for all qualifying recipients, *not* "direct money payments" as was provided to the colleges in *Roemer*. *Id.* at 842,

844. Thus, the *Rosenberger* majority chided the court of appeals and the dissent for relying on *Roemer* and other cases like it not because those cases were no longer good law, but because they dealt with a different issue—our issue: the Establishment Clause implications of a "neutral [state] program" providing "direct money payments to an institution" that may be "engaged in religious activity." *Id.* at 842. The *Rosenberger* Court expressly found *Roemer* did not "control[]" the situation before it. *Id.*; see also *id.* at 840-41 (payments "to private contractors for the cost of printing" differs from a "tax levied for the direct support of a church," which would be "contrary to" the Establishment Clause; "[o]ur decision . . . cannot be read as addressing an expenditure from a general tax fund").

Distinguishing the "direct money payments" at issue in *Roemer* obviously was also critical to Justice O'Connor's necessary fifth vote in *Rosenberger*. She cited *Roemer* and emphasized in her separate concurring opinion that although "some government funding of secular functions performed by sectarian organizations" is permissible, "no precedent" allows "the use of public funds to finance religious activities" even if pursuant to a neutral government program that benefits religious and non-religious institutions alike. *Id.* at 847. Justice O'Connor specifically rejected the view that *Rosenberger* "signals the demise of the funding prohibition in Establishment Clause jurisprudence." *Id.* at 852. Rather, Justice O'Connor supported the continued vitality of *Roemer*, emphasizing that the program in *Rosenberger* did not violate the Establishment Clause in large part because funds did "not pass through the [religious] organization's coffers" and were not "a block grant to religious organizations." *Id.* at 850. Were such the case (as contemplated in *Roemer*), Justice O'Connor indicated that "the danger of imper-

missible use of public funds to endorse Wide Awake's religious message" would be evident. *Id.* at 852.

The *Rosenberger* Court, therefore, could not have been clearer; the indirect funding at issue in *Rosenberger* and the direct provision of money grants in *Roemer* are two mutually exclusive, non-intersecting doctrines. *Roemer* is not "control[ling] in the *Rosenberger* situation and *Rosenberger* does not "address[]" *Roemer*. *Rosenberger*, 515 U.S. at 841-42.

Rosenberger not only fails to overrule *Roemer*, but like *Witters* and *Agostini*, it reaffirms, as the Court has on many other occasions, the distinction between direct and indirect government aid. The Court has repeatedly found this distinction critical when determining whether state aid to a "pervasively sectarian" institution would impermissibly advance religion. *See, e.g., Agostini*, 117 S. Ct. at 2013 (program did not violate Establishment Clause because aid is directed to students attending religious schools with no state funds "ever reach[ing] the coffers of religious schools"); *Rosenberger*, 515 U.S. at 841-42 (university providing printing facilities for all qualified student publications confers indirect benefit to religiously affiliated magazine, and is *not* "a general public assessment assigned and effected to provide [direct] financial support for a church" because . . . "no public funds flow directly to [magazine's] coffers"); *Witters*, 474 U.S. at 488 (vocational assistance "paid directly to the student" does not "provide . . . financial support for nonpublic, sectarian institutions").

"[T]he form of [this direct] aid"—a *money* payment to the recipient organization rather than provision of equipment or services—heightens the danger that a state may impermissibly advance religion. *Roemer*, 426 U.S. at 749; *see also Agostini*, 117 S. Ct. at 2015; *Rosenberger*, 515 U.S. at 843. This is so because "the direct

transfer of public monies," the most fungible and unrestricted type of aid, to an educational institution engaging in religious activities, particularly a pervasively sectarian institution, signifies "affirmative involvement characteristic of outright government subsidy." *Nyquist*, 413 U.S. at 774, 806-07 (Rehnquist, J., concurring in part and dissenting in part) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 690-91 (1970) (Brennan, J., concurring)); *cf. Rosenberger*, 515 U.S. at 844 ("By paying outside printers" rather than directly paying student magazine its printing costs, "the University in fact attains a further degree of separation from the student publication."); *Zobrest*, 509 U.S. at 12-13 (distinguishing provision of interpreter to disabled student under IDEA as permissible because purpose was *not* to provide "financial support for nonpublic, sectarian institutions" and could not be characterized as a "direct cash subsidy to a religious school" (emphasis added; internal citations and quotation marks omitted)).

The Supreme Court has never upheld a direct transfer of monies to a pervasively sectarian institution to fund its core educational functions. Moreover, in *Roemer* the Court concluded, in the context of the very program at issue here, that such a transfer would impermissibly advance religion.³ Notwithstanding *Columbia Union's* con-

³ Were a college found to be "religiously affiliated" as opposed to "pervasively sectarian," however, the *Roemer* Court held that it could be funded under the SELLINGER Program without resulting in any excessive "entanglement" in religious affairs. *Roemer*, 426 U.S. at 764-65. Moreover, *Roemer* also makes clear that states, in making funding decisions, and courts in reviewing them, are competent to decide whether a college is "pervasively sectarian" without resulting in any "excessive entanglement." *See id.*; *cf. Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 20 (1989) ("[there exists an] overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits

tention to the contrary, the Supreme Court has never overruled *Roemer*. Rather, *Roemer* remains good law, and we, absent a clear directive from the Supreme Court, are duty bound to enforce it.

IV.

Having determined that direct state funding of the general education courses of a "pervasively sectarian" institution would violate the Establishment Clause, we must now decide whether the district court properly held that Columbia Union is, as a matter of law, a "pervasively sectarian" institution.

A.

In assessing whether an institution is "pervasively sectarian" a court must "paint a general picture of the institution, composed of many elements." *Roemer*, 426 U.S. at 758. These "elements" are not clearly defined "absolutes of the physical sciences or mathematics," *Tilton v. Richardson*, 403 U.S. 672, 678 (1971), which can be applied like a "litmus-paper test," *Regan*, 444 U.S. at 662, to produce a definitive, unassailable result. Indeed, because the Supreme Court has never held any institution of higher education to be "pervasively sectarian," we lack even a clear "general picture" of a "pervasively sectarian" college or university.⁴

of differing religious claims"). Neither party disputes that the same holds true in this case.

⁴ The Supreme Court has held primary and secondary schools to be "pervasively sectarian." See, e.g., *Meek v. Pittenger*, 421 U.S. 349, 356, 364-67 (1975); *Ball*, 473 U.S. at 373. However, the Court has often noted that children at this "impressionable age" are more prone to religious indoctrination than students attending colleges or universities. See *Lemon*, 403 U.S. at 616; see also *Tilton*, 403 U.S. at 686 ("college students are less impressionable and less susceptible to religious indoctrination"). Accordingly, while the

Nonetheless, *Roemer* and its progenitors, *Tilton* and *Hunt*, do provide us substantial guidance. In those cases, although the Supreme Court held that religiously affiliated colleges were not pervasively sectarian, it identified characteristics of a "pervasively sectarian" college. These characteristics fall into four general areas of inquiry: (1) does the college mandate religious worship, (2) to what extent do religious influences dominate the academic curriculum, (3) how much do religious preferences shape the college's faculty hiring and student admission processes, and (4) to what degree does the college enjoy "institutional autonomy" apart from the church with which it is affiliated. See generally *Roemer*, 426 U.S. at 755-58; *Hunt*, 413 U.S. at 743-44; *Tilton*, 403 U.S. at 685-86.

The Court has never discussed the relative importance of these factors. Clearly, though, no one of them in isolation is dispositive. For example, although "Catholic religious organizations . . . governed" all the colleges in *Tilton*, their lack of institutional autonomy simply constituted one factor in favor of finding them pervasively sectarian. *Tilton*, 403 U.S. at 686-87. Similarly, the colleges at issue in *Roemer* required students to take certain religion courses, but this fact alone did not render them pervasively sectarian. *Roemer*, 426 U.S. at 756.

A careful reading of *Roemer*, *Tilton* and *Hunt* leads to the inescapable conclusion that even colleges obviously and firmly devoted to the ideals and teachings of a given religion are not necessarily "so permeated by religion that the secular side cannot be separated from the sectarian." *Roemer*, 426 U.S. at 759 (quoting *Roemer v. Board of Pub. Works of Md.*, 387 F. Supp. 1282, 1293 (D. Md. 1975)). Indeed, the Supreme Court has set the

factors demonstrating that a primary or secondary school is "pervasively sectarian" may be instructive here, they are not dispositive.

bar to finding an institution of higher learning pervasively sectarian quite high. We believe that to find religion *pervades* a college to such a degree that religious indoctrination thoroughly dominates secular instruction, the college must in fact possess a great many of the following characteristics: mandatory student worship services; an express preference in hiring and admissions for members of the affiliated church for the purpose of deepening the religious experience or furthering religious indoctrination; academic courses implemented with the primary goal of religious indoctrination; and church dominance over college affairs as illustrated by its control over the board of trustees and financial expenditures. *See generally Roemer*, 426 U.S. at 755-58; *Hunt*, 413 U.S. at 743-44; *Tilton*, 403 U.S. at 685-86; *see also Ball*, 473 U.S. at 384 n.6; *Meek v. Pittenger*, 421 U.S. 349, 356 (1975); *Nyquist*, 413 U.S. at 767-68; *Lemon*, 403 U.S. at 615-18.

These elements should not be read as a "pervasively sectarian" template that, when placed over every religiously affiliated college, precisely determines the degree of its religiosity. Matters as difficult and important can never be so easily resolved. Rather, we set them out to provide some guidance and to clarify that the Supreme Court regards a "pervasively sectarian" college as a rarity, to be so designated only after a thorough and searching inquiry.

Maintaining the delicate balance required by the First Amendment's Religion Clauses always presents a task fraught with difficulty. Deciding whether religion so pervades an institution of higher learning that a "substantial portion of its functions are subsumed in the religious mission," *Hunt*, 413 U.S. at 743, mandates particularly careful analysis. What the Supreme Court has said and done—and what it has not said and done—suggest that a court

should approach this task with an appreciation of the political process and realization that ours is a society made rich by religious and philosophical diversity. When duly elected political leaders determine for good and sufficient secular purposes that they wish to provide government funding to assist private institutions of higher learning (including private religious institutions) with secular academic pursuits, a court cannot upset that decision unless, after examining *all* of the evidence in light of the above factors, it determines that an institution is truly "pervasively sectarian."

With these principles in mind, we turn to the district court's decision.

B.

The district court took careful note of the appropriate areas of inquiry and conscientiously attempted to apply the Supreme Court's directives to the facts before it. However, for the reasons set forth below, we believe the court erred in concluding that application of the law to those facts warranted the grant of summary judgment to the State. We note that summary judgment is only proper if there is no dispute as to "any material fact," Fed. R. Civ. P. 56(c), or as to the *reasonable* inferences that can be drawn from the facts. *See M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 163 (4th Cir. 1993) (en banc). Where the party challenging the grant of summary judgment can "show that the inferences they suggest are 'reasonable in light of the competing inferences,'" summary judgment must be denied. *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)).

With regard to the first factor, mandatory attendance at religious worship services, the district court noted that

Columbia Union has an official policy of once-weekly mandatory prayer services for resident students and three out of six smaller meetings for these same students in their dormitories. *See Columbia Union*, 988 F. Supp. at 902. Students can face disciplinary proceedings for failure to attend a certain number of such meetings. *Id.* These mandatory prayer services do, as the district court held, weigh in favor of finding the college pervasively sectarian. *Id.* Columbia Union, however, points to additional evidence demonstrating the "mandatory" nature of its policy may not be as compulsory as the words suggest. The policy only applies to students under the age of 23 who attend classes during the day and live in resident halls. This limitation, combined with Columbia Union's liberal excuse policy, results in only 350 to 400 of Columbia Union's 1172 students being required to attend services. Well over half of the student body, therefore, is *not* so compelled.

A reasonable fact finder could find the college's mandatory prayer policy, requiring attendance at religious services of the vast majority of its *resident* students, reveals that Columbia Union is primarily interested in religious indoctrination at the expense of providing a secular education. *Cf. Roemer*, 426 U.S. at 755 (even though Roman Catholic chaplains employed by the colleges conducted religious exercises on campus, attendance was not required and the district court found "religious indoctrination [wa]s not a substantial purpose or activity of" the colleges (quoting *Roemer*, 387 F. Supp. at 1282, 1293)). However, a fact finder could also reasonably infer that Columbia Union's mandatory prayer policy has a limited reach, suggesting that while religious principles are important to the college, they are not *so* important as to warrant a finding that "religious indoctrination" is more

than a "secondary objective." *Id.* Where both reasonable inferences coexist, on the State's motion for summary judgment a court must credit the inference most favorable to Columbia Union.

As to the second *Roemer* factor, the district court concluded for several reasons that religion dominates the college's academic courses. Initially, the court relied on two statements found in the college's 1996-97 bulletin—the religion department "believes that in a Christian college, Christian principles should characterize every phase of college life, whether it be intellectual, physical, social, or moral"; and the religion faculty, through "their dedication to Jesus Christ," seeks to "show [students] how Christian principles offer satisfactory answers to the perplexing problems facing the world today." The court ruled that the college's mandatory religion courses, taught by a faculty governed by these principles, "contribute to an overall mosaic that is pervasively sectarian." *Columbia Union*, 988 F. Supp. at 902.

The problem with this inference is that the *Roemer* Court expressly held that mandatory religion courses do not necessarily constitute evidence that a college is "pervasively sectarian" because they may "only supplement a curriculum covering 'the spectrum of a liberal arts program.'" *Roemer*, 426 U.S. at 757 (quoting *Roemer*, 387 F. Supp. at 1288). Columbia Union's course bulletin reveals that, like the colleges in *Roemer*, it offers a wide variety of traditional liberal arts courses, *e.g.*, biology, chemistry, physics, nursing, history, philosophy, psychology. Neither party introduced any evidence—one way or the other—about how these traditional liberal arts or mandatory religion courses are taught. Without such evidence, the religion department's general mission statements cannot support only one plausible conclusion, namely that

the courses at Columbia Union predominantly focus on "deepening students' religious experiences." *Columbia Union*, 988 F. Supp. at 902. Rather, an equally plausible inference is that the college predominantly exposes its students to a wide variety of academic disciplines, including religious teachings.

In concluding that Columbia Union stifles academic freedom on its campus, the district court also relied on statements in the college's faculty handbook directing the faculty to "bear in mind their peculiar obligation as Christian scholars and members of a Seventh-day Adventist College" and noting that they have "complete freedom so long as their speech and actions are in harmony with the philosophies and principles of the college—a Seventh-day Adventist institution of higher education." *Id.* Again, the district court read these statements in the light least, rather than most, favorable to Columbia Union. If these statements are consistent with the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors, as Columbia Union asserts, then they provide no proof that the college's religious mission impinged too greatly on its academic freedom. This is so because the Supreme Court has expressly credited compliance with the 1940 statement as evidence demonstrating that a college permits "intellectual freedom" despite its religious affiliation. *See Roemer*, 426 U.S. at 756; *Tilton*, 403 U.S. at 681-82.

The district court also concluded that descriptions in the college bulletin of several "nominally secular academic departments are replete with references to secular religion" and that these references constituted evidence of a lack of academic freedom. *Columbia Union*, 988 F. Supp. at 903. Notably, the district court highlighted one of the business

department's statements announcing its goal to instill in students "an approach to people, work, and life that demonstrates outstanding Christian values and ethics." *Id.* This religious reference is one of only two found in the bulletin's business department section, which spans over ten pages. These passages do supply evidence to support a reasonable inference that the school crafts its teachings based on religious principles of the Seventh Day Adventist Church. However, the remainder of the business department section contains no religious commentary, and reads much like the following passage:

The business curriculum combines a challenging liberal arts education with a strong foundation in business. Students receive a broad-based education, interweaving courses in the arts, sciences, and humanities with a professional education that will enable them to influence the community through competent and caring service. Through their business classes, they gain solid grounding in business fundamentals and depth in individual areas of concentration. Analytical and communications skills are emphasized across the business curriculum.⁵

In context, the religious references are simply not enough, in number or in nature, to *compel* the inference that Columbia Union's attempts at religious indoctrination compromise its academic freedom.

As to the third *Roemer* factor, the district court held that "faculty hiring and student admissions decisions *do not appear* to be made without regard to religion." *Id.* at 903 (emphasis added). This may be so but facts, not

⁵ This same point holds true for all of the other departments to which the district court refers. *See Columbia Union*, 988 F. Supp. at 903.

appearances, count here. No facts *mandate* the court's ultimate conclusion that "religion plays a role in faculty hiring and student admissions decisions." *Id.* True, as the district court noted, 36 of 40 full time faculty members are Seventh Day Adventists and the college's literature states it reserves the right "to give preference" to members of the Seventh Day Adventist Church in its hiring decisions. *Id.* However, when part-time instructors are included, only fifty-seven percent of the faculty are Adventists, and the record is silent on whether the college in fact exercises its right to prefer Adventists for faculty positions. The record is also silent on the college's hiring procedures, the criteria it applies, and the nature of the applicant pool. We simply do not know anything about how or why the college selects its faculty. Thus, this slim record does not mandate the conclusion that a college, widely known for its affiliation with the Seventh Day Adventist Church, in fact exercises a hiring preference for Seventh Day Adventists.

Nor does the fact that Columbia Union asks its students to evaluate their professors based in part on whether a professor stresses Christian values and philosophy in the classroom require this conclusion. This evidence certainly suggests that the college expects classes to be conducted with Christian teachings in mind, but it says nothing about the criteria employed for hiring faculty, *i.e.*, whether Columbia Union is making a conscious effort to "stack its faculty with members of a particular religious group." *Roemer*, 426 U.S. at 757 (internal quotation marks and citations omitted). Implicit in the district court's conclusion as to faculty hiring is the view that a college's exercise of a religious preference in hiring *under all circumstances* weighs in favor of finding that a school is pervasively sectarian. The *Roemer* Court rejected this view. Rather, a college can follow a religious preference in hiring when it demonstrates its intent to do

so for reasons other than "stack[ing]" the faculty with members of its affiliated religious order. *Id.*; *cf. id.* (noting "[b]udgetary considerations" prompting colleges to "favor members of religious orders, who often receive less than full salary" reveal that preference was not designed to further any religious mission).

The district court similarly concluded that religion "plays a role . . . in student admissions decisions," *Columbia Union*, 988 F. Supp. at 903, relying on the following evidence: (1) eighty percent of the college's full-time students and twenty percent of its part-time students are Seventh Day Adventist, (2) the college asks applicants their religious affiliation, and (3) the college bulletin states it "welcomes applications from all students whose principles and interests are in harmony" with those of Columbia Union. Although this evidence certainly provides possible proof of religious preference in admission policies, it does not mandate that conclusion.

As the district court itself acknowledged, that a "great majority" of students are affiliated with a church does not conclusively support finding a college pervasively sectarian. *Id.* at 903 (citing *Roemer*, 426 U.S. at 757); *see also Hunt*, 413 U.S. at 743-44 (noting that sixty percent of student body affiliated with Baptist church reflected demographics of surrounding area, not college exercising a religious preference). Indeed, *Roemer* instructs a trial court to conduct a "thorough analysis of the student admission and recruiting criteria" to determine whether such a preference is in fact exercised. *Roemer*, 426 U.S. at 757 (internal quotation marks and citations omitted). The district court failed to do this.

Nor can we, after a full review of the record before us, determine the college's "admissions and recruiting criteria," and whether they include a preference for Seventh

Day Adventists. That the college bulletin encourages applicants with similar "principles and interests" to apply does not necessarily signal that students should do so only if they are affiliated with the Seventh Day Adventist Church. Indeed, this statement gains meaning only in light of the college's actual "principles and interests." Much of Columbia Union's published material reflects the college's endorsement of both religious and nonreligious "principles and interests." For example, the college bulletin discusses the importance of "academic honesty" in its student body, emphasizing that plagiarism or cheating is strictly prohibited. This statement, to be sure, illustrates a "principle" or "interest" of the school, but not one that is pervasively sectarian or even overtly connected to the teachings of the Seventh Day Adventist Church. Thus, based on this evidence, a reasonable factfinder could conclude that Columbia Union may or may not exercise a religious preference in admissions; on summary judgment, we must credit the inference most favorable to Columbia Union.

Finally, the district court determined that "Columbia Union is not 'characterized by a high degree of institutional autonomy' as were the colleges in *Roemer*." *Columbia Union*, 988 F. Supp. at 901 (quoting *Roemer*, 426 U.S. at 755). The court based this conclusion on Columbia Union's receipt of a gift from the Seventh Day Adventist Church of \$2.5 million (or 21.5% of its total unrestricted educational and general revenues budget) and the fact that under the college's by-laws, 34 of 38 members of the Board of Trustees must be members of the Seventh Day Adventist Church. *Id.*

These facts undeniably demonstrate that Columbia Union enjoys less autonomy than the colleges in *Roemer*. Cf. *Roemer*, 426 U.S. at 755 (although Catholic Church representatives served on the colleges' governing boards,

"none of the four receive[d] funds from, or makes reports to, the Catholic Church"). However, as the district court itself recognized, the Supreme Court held that the colleges at issue in *Tilton* and *Hunt* were not pervasively sectarian even though they were "arguably under more control by their affiliated church than" Columbia Union. *Columbia Union*, 988 F. Supp. at 901; see also *Hunt*, 413 U.S. at 743 (Baptist Convention elected college board of trustees, approved certain financial transactions, and was the only body permitted to amend college charter); *Tilton*, 403 U.S. at 686 ("All four schools are governed by Catholic religious organizations."). As in *Hunt* and *Tilton*, the college's relative lack of institutional autonomy is a factor to be weighed in favor of finding it pervasively sectarian, but it is no more determinative here than it was in *Hunt* or *Tilton*.⁶

In sum, the district court's grant of summary judgment to the State suffered from two fatal flaws. First, the court rested its conclusion that Columbia Union is "pervasively sectarian" on an incomplete record, and second, the court often considered those facts that it did have before it in the light *least*, rather than most, favorable to Columbia Union. Accordingly, we must remand to the district court for further proceedings.

C.

We recognize that the parties have asserted, both before the district court and us, that no material facts were

⁶ The district court recognized that this factor could "not be viewed in isolation" but concluded that "the colleges at issue in *Hunt* and *Tilton* were far less sectarian" than Columbia Union, and so in Columbia Union's case its lack of institutional autonomy "lends support to the overall conclusion" that it "is pervasively sectarian." *Columbia Union*, 988 F. Supp. at 902. But the district court's determination that the *Hunt* and *Tilton* colleges are otherwise far less sectarian than Columbia Union rests on the inferences discussed above that we have held improper. See *id.* at 902 n.8.

disputed and so the case was ripe for summary judgment. Although such statements are of interest, they cannot and do not establish the propriety of deciding a case on summary judgment. See *Worldwide Rights Ltd. Partnership v. Combe, Inc.*, 955 F.2d 242, 244 (4th Cir. 1992) (simply because both parties move for summary judgment "does not 'establish that there is no issue of fact'" requiring "that summary judgment be granted to one side or another" (quoting *American Fidelity Cas. Co. v. London & Edinburgh Ins. Co.*, 354 F.2d 214, 216 (4th Cir. 1965))). Particularly when deciding difficult constitutional questions dependent on intensely factual determinations, as in the case at hand, a court must assure itself that it has before it a full and complete factual record. See, e.g., *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948).

Thus, in deciding the difficult question presented here, the Supreme Court has consistently so assured itself of precisely this. The Court has often noted district court's diligence in holding lengthy evidentiary hearings and making numerous factual findings to determine whether an institution was "pervasively sectarian." See, e.g., *Ball*, 473 U.S. at 380, 384 (after an "8-day bench trial" the district court made factual findings based on a record of "massive testimony and exhibits" (internal quotation marks omitted)); *Roemer*, 426 U.S. at 755-58 (Court quotes district court's numerous detailed factual findings, which were based on a "record of thousands of pages, compiled during several weeks of trial"); *Lemon*, 403 U.S. at 609, 615 ("[t]he District Court made extensive findings" after a hearing "at which extensive evidence was introduced" "concerning the nature of the secular instruction" offered at the schools).

Conversely, in *Bowen v. Kendrick*, 487 U.S. 589 (1988), when a district court did attempt to resolve this

question on summary judgment, the Supreme Court reversed and remanded for additional fact-finding. In *Bowen*, the district court had determined that a federal statute providing funds for programs to reduce teen pregnancy violated the Establishment Clause both facially and as applied.⁷ With respect to the "as applied" challenge, the Court held that the district court "did not follow the proper approach in assessing" the claim that government funding violated the Establishment Clause. *Id.* at 620. The Court criticized the district court for failing to explore with "any particularity" evidence that would "warrant[] classification" of the institutions "as 'pervasively sectarian.'" *Id.*

The only evidence before the district court in *Bowen* was written "by-laws [and] policies that prohibit any deviation from religious doctrine" and evidence demonstrating "explicit corporate ties" to a religious organization. *Id.* at 620 n.16. The Supreme Court stressed that although such evidence was "relevant to the determination of whether an institution is pervasively sectarian, [it was] not conclusive." *Id.* (emphasis added; internal quotation marks omitted). Accordingly, the Court remanded the case to the district court with directions to engage in further factfinding, bearing in mind that under *Tilton*, *Hunt*, and *Roemer*, "it is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is 'religiously inspired.'" *Id.* at 621. *Bowen*, therefore, calls into question any determination, made at the summary judgment stage, that an institution is "pervasively sectarian" based largely on "by-laws" and "policy" statements. *Id.*

Finally, in *Roemer* itself the Court made clear that, to find an institution pervasively sectarian, a trial court must

⁷ The Court analogized the statute at issue in *Bowen* to the grant provisions at issue in *Roemer*. *Bowen*, 487 U.S. at 608.

consider not only the institution's written literature, policies, and statements, but also its practices. *See Roemer*, 426 U.S. at 756 (citing *Roemer*, 387 F. Supp. at 1293 (evidence of "uncontroverted faculty testimony" demonstrated that faculty taught without fear of religious pressures in "classroom presentations or their selections of texts or course materials")); *see also Tilton*, 403 U.S. at 681 (although those challenging government aid "introduced several institutional documents on what could be taught, other evidence showed that *these restrictions were not in fact enforced*" (emphasis added)). Although in this case the district court considered many of Columbia Union's written policies, it did not begin to explore the college's practices pursuant to those policies.

In sum, notwithstanding the parties' views, determination of this case on summary judgment on this record is impossible.⁸ Neither the Supreme Court, nor any circuit court to our knowledge, has ever found a college to be pervasively sectarian. The decision is not a simple one.

⁸ Our dissenting colleague agrees with the holdings reached in the first three portions of this opinion, but disagrees with our ultimate conclusion that this case must be remanded. We, too, regret the burdens imposed by a remand but believe that the importance of the constitutional interests asserted here and the complexity of the required legal inquiry mandate nothing less. On remand, the parties may well be able to ease these burdens by stipulating to many of the unresolved factual issues. But notwithstanding the parade of horrors and rhetorical questions in the dissent, Supreme Court precedent requires examination of not only a college's written policies, but also of how a college implements those policies; a just determination of the latter question is simply impossible on this record. Moreover, the Supreme Court has specifically held (and neither Columbia Union nor the State disputes) that when a court conducts this sort of examination it does not engage in any "excessive entanglement" with religion. *See Roemer*, 426 U.S. at 764-65. By ignoring *Roemer's* dictates and instead suggesting that *Roemer* requires affirmance on the basis of the inadequate record here, the dissent attempts to undermine the very precedent it concedes we must follow.

The criteria for assessing whether an institution is pervasively sectarian are complex, elusive, and heavily fact intensive. Given the "far-flung import" of this case, *Kennedy*, 334 U.S. at 257, no court could or should decide whether Columbia Union is pervasively sectarian based solely on the evidence in this record, which is comprised almost exclusively of the college's written literature and policies. Controlling Supreme Court law, as well as common sense, mandate that a court review not only the college's written policies, but also its practices, to determine whether religious indoctrination pervades the institution. We remand the case to the district court so that it can have an opportunity to make the requisite full and careful determinations necessary here.

VACATED AND REMANDED

WILKINSON, Chief Judge, dissenting:

The majority sidesteps the central issue in this case by sending it back to district court for yet another round in a seemingly endless dispute over Columbia Union College's claim to funding under Maryland's Sellinger Program. The legal question that should be confronted now—and not avoided by a remand—is whether the discriminatory treatment of Columbia Union on the basis of its religious viewpoint is compelled by the Establishment Clause.

The majority remands despite the fact that the parties submitted this case below on cross-motions for summary judgment. Both sides agree that no material facts are in dispute. Contrary to the majority, I believe the agreed-upon facts provided the district court with more than an adequate basis to reach its decision.

Most importantly, by remanding for intensive factfinding, the majority unduly burdens both parties. It apparently would require district courts to leave no stone unturned in Establishment Clause inquiries into whether educational institutions are properly considered pervasively sectarian. The majority sets the stage for what should prove to be a relentless inquisition into the religious practices of Columbia Union, its teachers, and its students. To obtain funding, Columbia Union will have little choice but to mold itself to an exhaustive template of "non-sectarianism," jettisoning in the process many of the beliefs and practices that it holds most dear. For these reasons, I believe the result reached by the majority is not only unnecessary, but also threatening to important values inherent in the First Amendment's speech and religion clauses.

I.

A.

Maryland's denial of funding to Columbia Union on the basis of its religious viewpoint is a denial of the right to freedom of speech under the First Amendment. Maryland's Sellinger Program exists to support private higher education generally. Funding is thus available to any nonpublic institution of higher education that meets neutral statutory requirements. In this sense, Maryland has created a limited forum in much the same way as the Supreme Court in *Rosenberger* found the University of Virginia had by funding a diversity of views in students' extracurricular activities. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 824, 830 (1995).¹ Yet even within such a limited forum, the State may not "discriminate against speech on the basis of its viewpoint." *Id.* at 829; see *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993). Because the State restricts speech on the basis of "the specific motivating ideology or the opinion or perspective of the speaker," *Rosenberger*, 515 U.S. at 829, viewpoint discrimination is uniquely antithetical to First Amendment ideals of freedom of belief and expression. Government must not be permitted to silence one side of a debate, in this case the religious perspective, while permitting other more favored views to flourish unopposed. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992)..

¹ The Court's recent decision in *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998), is not to the contrary. The Court distinguished that case from *Rosenberger* on the ground that NEA grants are not generally available but rather are awarded through a "competitive process." *Finley*, 118 S. Ct. at 2178. Like the subsidy considered in *Rosenberger*, however, Maryland's educational grants are made available generally through a noncompetitive process. Accordingly, this case is governed by the First Amendment analysis set forth in *Rosenberger*.

Columbia Union has done everything that Maryland has asked of every institution it funded. Indeed, if it were any other institution, funding would be coming its way. The college has satisfied each of the neutral statutory requirements for participation in the Sellinger Program. Specifically, Columbia Union is a nonprofit private college that was established in Maryland before 1970; it is approved by the Maryland Higher Education Commission (MHEC), it is accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools; it has awarded associate of arts or baccalaureate degrees to at least one graduating class; it maintains earned degree programs other than seminarian or theological ones; and it has submitted its program to the MHEC for review. Furthermore, Columbia Union's president has pledged by sworn affidavit, as required by MHEC regulations, that any aid received through the Sellinger Program will not be used for sectarian purposes.

Maryland has thus denied funding to Columbia Union for one reason only—its sectarian character. By denying Columbia Union funding on the basis of its sectarian approach to education, Maryland has impermissibly discriminated against the college on the basis of its religious point of view. This finding sets the stage for the critical question in this case: whether Maryland's viewpoint discrimination is justified by its need to comply with the Establishment Clause. See *Rosenberger*, 515 U.S. at 837.

B.

In an earlier era of Establishment Clause jurisprudence, it was perfectly clear that Columbia Union had no claim to funding. In *Roemer v. Board of Public Works*, 426 U.S. 736, 755 (1976) (plurality opinion), the Supreme Court held that the Establishment Clause prohibits government aid "to institutions that are so 'pervasively sectar-

ian' that secular activities cannot be separated from sectarian ones." Three years earlier in *Hunt v. McNair*, 413 U.S. 734, 743 (1973), the Court had explained that "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission" The Court reaffirmed this principle in *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988), explaining that "[o]ne way in which direct government aid might have [the primary effect of advancing religion] is if the aid flows to institutions that are 'pervasively sectarian.'"

But Establishment Clause jurisprudence has changed since *Hunt*, *Roemer*, and *Bowen*. The general funding prohibition announced in those decisions has gradually been relaxed to permit government aid to religious institutions and organizations when accomplished through neutral government programs. Columbia Union contends that the Court's more recent neutrality principle has in fact supplanted the Court's prior funding prohibition decisions and should govern our case today. The college claims that because Maryland's Sellinger Program awards funding to private institutions of higher education under neutral criteria, without regard to the institution's sectarian or nonsectarian character, the provision of funds to Columbia Union cannot offend the Establishment Clause.

As a matter of prediction, Columbia Union may be right. There is no question that the neutrality principle is on the rise. Beginning with its decision in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Supreme Court has frequently turned to a neutrality principle in assessing Establishment Clause challenges to state aid programs. If the program by which a religious institution receives assistance is neutral, in that it extends benefits to a wide range of recipi-

ents without regard to their religious nature, it normally will survive an Establishment Clause challenge. In *Wit-
ters*, for example, the Court upheld that provision of state funds for a blind student's education at a bible college to become "a pastor, missionary, or youth director." *Id.* at 483. Of importance to the Court was the fact that the aid in question was given under a general vocational rehabilitation program. The Court therefore explained its decision as resting in part on the fact that the aid was "made available generally without regard to the sectarian-nonsectarian, or public nonpublic nature of the institution benefited." *Id.* at 487 (internal quotation marks omitted).

The neutrality principle became more pronounced in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), where the Court again approved aid in support of education at a pervasively sectarian educational institution. The Court specifically held that the Establishment Clause was not violated by the provision of an interpreter to a deaf student attending a Roman Catholic high school. The Court noted: "[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Id.* at 8.

Next came *Rosenberger*, in which the Supreme Court again strengthened the neutrality principle: "A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." 515 U.S. at 839. The Court contributed to the quickening rise of the neutrality principle by holding that the Establishment Clause is not offended when the government extends benefits to recipients with religious viewpoints, so long as the benefit program is governed by

neutral criteria. "More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Id.* Applying the neutrality principle, the Court again upheld the funding of religion—in this case a printer for a religious publication at the University of Virginia. *Id.* at 845-46.

Then in *Agostini v. Felton*, 117 S. Ct. 1997 (1997), the Court took a giant step toward neutrality by actually overruling one of its prior funding prohibition decisions. See *Aguilar v. Felton*, 473 U.S. 402 (1985). Specifically, the Court upheld a federally funded program under which disadvantaged children were provided remedial education on the premises of sectarian schools by government employees. The Court noted with approval its prior decisions "sustain[ing] programs that provided aid to all eligible children regardless of where they attended school." 117 S. Ct. at 2014. Significantly, the Court justified its decision to disregard precedent by noting the dramatic shift in its Establishment Clause jurisprudence since the 1985 *Aguilar* decision. *Agostini*, 117 S. Ct. at 2017.

Finally, the emergent neutrality principle already has found its place in the Free Exercise Clause. Specifically, in *Employment Division v. Smith*, the Court noted that it has "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. 872, 879 (1990) (emphasis added) (internal quotation marks omitted). The Court went on to hold that Oregon could deny unemployment benefits to individuals whose dismissal resulted from the use of drugs made il-

legal under Oregon law. The application of the neutrality principle under the Establishment Clause, therefore, would bring both of the religion clauses into step.

The neutrality principle that courses through the Court's recent decisions certainly would not forbid Maryland from funding Columbia Union under the Sellinger Program. As already noted, Maryland provides funding generally to private institutions of higher education, without regard to their sectarian or nonsectarian character. Indeed, three of the institutions that participated in the program during fiscal year 1997 were affiliated with the Roman Catholic Church. The Maryland program also requires that the recipient institution not use any of the funds received for sectarian purposes.

To hold that Maryland must refuse Columbia Union funding while allowing it to extend aid to other religious institutions would violate the very principle of neutrality required by the Establishment Clause. See *Rosenberger*, 515 U.S. at 845-46; *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 707 (1994) ("[I]t is clear that neutrality as among religions must be honored."). The denial of state aid to only certain types of religious institutions—namely, pervasively sectarian ones—exposes government to accusations of religious favoritism. Nowhere is this more evident than in the administration of Maryland's Sellinger Program: Colleges affiliated with the Roman Catholic Church have been approved while Columbia Union, a Seventh-day Adventist institution, has been rejected. For the sake of avoiding the mere *potential* that secular aid will somehow advance sectarian objectives, Maryland has directly violated a different core principle of the Establishment Clause, the requirement of nondiscrimination among religions. Just as all private institutions should be treated neutrally, so should all religious viewpoints be treated similarly. Mary-

land's program now does neither of these things. Because the Sellinger Program violates the Supreme Court's recent neutrality principle in two respects, I would unhesitatingly find Columbia Union's pervasively sectarian character irrelevant and reverse the judgment of the district court.

C.

We do not, however, write on so clean a slate. The funding prohibition principle is hanging on, if only by its fingernails. Although the Court has repeatedly upheld government aid to religious institutions on the basis of the neutrality of the program under which it is provided, the Court has notably failed to expressly overrule its prior decisions in *Hunt*, *Roemer*, and *Bowen*. Moreover, *Witters*, *Zobrest*, *Rosenberger*, and *Agostini* are all distinguishable from the precise case before us today.

In *Witters* and *Zobrest*, the Court focused on the fact that the state aid was given directly to the student rather than to the religious school. *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 487. This ensured that any aid ultimately flowing to the religious institutions did "so only as a result of the genuinely independent and private choices of aid recipients." *Witters*, 474 U.S. at 487; see also *Zobrest*, 509 U.S. at 10-11. In fact, *Zobrest* is further distinguished by the fact that no direct cash subsidy was involved and thus no government funds ever reached the coffers of the sectarian high school. 509 U.S. at 10. In contrast, the Court's decisions in *Hunt*, *Roemer*, and *Bowen* implicated various forms of *direct* funding of the religious institutions themselves. As Maryland's program provides a direct subsidy to religious schools, it must be evaluated under these prior decisions.

Rosenberger likewise failed to overrule the earlier *Hunt-Roemer-Bowen* trilogy. The rule against direct funding of pervasively sectarian institutions did not apply in

Rosenberger because no public monies flowed directly into the coffers of the religious publication; all payments were made to a third-party printer. *Id.* at 843. Noting the potential relevance of the prior funding prohibition cases, the Court explained that it was “correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions,” *id.* at 842, and cited *Bowen*, *Roemer*, and *Hunt* as examples of such decisions. The Court also found its prior funding prohibition decisions distinguishable for “the additional reason that the student publication is not a religious institution, at least in the usual sense of that term as used in our case law.” *Id.* at 844. And if each of these clues were not sufficient to distinguish *Rosenberger* from the case we face today, Justice O’Connor clearly indicated in her concurrence that the Court’s decision “neither trumpet[ed] the supremacy of the neutrality principle nor signal[ed] the demise of the funding prohibition in Establishment Clause jurisprudence.” *Id.* at 852 (O’Connor, J., concurring). Thus, the abrogation of *Hunt*, *Roemer*, and *Bowen* would have to await another day.

Agostini similarly failed to overrule the funding prohibition announced in those three decisions. In *Agostini*, the Court held that public employees working on the premises of sectarian schools could not be presumed to inculcate religious beliefs in the students. 117 S. Ct. at 2012. The Court, however, did not hold that the funding of pervasively sectarian schools—in which the schools’ own employees teach the students—cleared the First Amendment’s hurdles. As in *Zobrest* and *Rosenberger*, the Court relied on the fact that no federal funds ever reached the coffers of the participating religious schools. *Agostini*, 117 S. Ct. at 2013.

Most importantly, the Court in *Agostini* sent an unmistakable message to lower courts that shifts in the Supreme Court’s Establishment Clause jurisprudence should not be interpreted as signifying that its prior decisions have indirectly been overruled:

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that “if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”

Id. at 2017 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). Our case clearly falls within that proscription. Although the funding prohibition announced in *Hunt*, *Roemer*, and *Court* in numerous applications of the neutrality principle, those three decisions have not been overruled, and they directly control here. It would in fact be difficult to find a case more directly controlling than *Roemer*, as it involved the exact same Maryland program that we face here. It is not our role to read the jurisprudential *Bowen* appears to rest on reasoning now rejected by the tea leaves. *Bowen*, *Roemer*, and *Hunt* remain the law and they require this court to uphold Maryland’s denial of funding to Columbia Union if it is a pervasively sectarian institution.

II.

A.

The district court found, both on the basis of the parties’ lengthy evidentiary submissions and prior findings by the MHEC, that Columbia Union is a pervasively sectar-

ian institution. I simply fail to understand how the majority can conclude that the extensive evidentiary record before the district court was so lacking that we must remand this case for further factfinding. The majority's decision is especially puzzling considering that the very religious institution claiming entitlement to funding agreed before the district court that no material facts were in dispute and, therefore, that disposition of this case at the summary judgment stage was appropriate.

Initially, the majority can point to no decision that requires that specific types of evidence be presented to a district court before it can properly find an institution pervasively sectarian.² Indeed, although the Supreme Court opinions addressing the subject rely on several common factors, no one inquiry has been mandated. To determine whether an institution is pervasively sectarian, "it is necessary to paint a *general* picture of the institution, composed of many elements." *Roemer*, 426 U.S. at 758 (emphasis added). Elements previously examined by the Supreme Court include the extent to which the religious institution is affiliated with or controlled by a church, *see id.* at 755; *Hunt*, 413 U.S. at 743; whether religious indoctrination is one of the institution's purposes, *see Roemer*, 426 U.S. at 755; whether the school is characterized by an atmosphere of academic freedom, *see id.* at 756; whether the institution encourages or requires prayer,

² The majority argues that a court "must consider not only the institution's written literature, policies, and statements, but also its practices" in divining an answer to the pervasively sectarian question. *Ante* at 29 (emphasis added) (citing *Roemer*, 426 U.S. at 756). Nothing in the Court's jurisprudence substantiates this claim. The majority points to *Bowen*, *Roemer*, and *Tilton v. Richardson*, 403 U.S. 672 (1971), for support. While each of these opinions utilizes evidence of practice, none requires it. Moreover, in *Tilton*, the Court explicitly relied, as the district court did in this case, on the parties' stipulations in making its determination. 403 U.S. at 686-87.

see id. at 756-57; whether there are religious qualifications for faculty hiring or student admissions, *see id.* at 757-58; *Hunt*, 413 U.S. at 743-44; and the religious makeup of the student population, *see Roemer*, 426 U.S. at 757-58; *Hunt*, 413 U.S. at 744.

As the majority concedes, the district court "took careful note of the appropriate areas of inquiry and conscientiously" considered evidence on each and every one of these factors. *Ante* at 21. Among its more significant conclusions, the district court found that Columbia Union was closely affiliated with, if not to a great extent controlled by, the Seventh-day Adventist Church; that Columbia Union's religious mission is furthered in part by requirements that students attend weekly chapel sessions and worship options in the residence halls; and that descriptions of even the college's secular courses were pervaded with religious references. The district court concluded that, *in combination*, the undisputed evidence under the several factors supported the conclusion that Columbia Union is a pervasively sectarian institution. I believe that the considerable evidence relied upon by the district court revealed no genuine dispute of material fact and, therefore, was more than sufficient to establish that Columbia Union is a pervasively sectarian institution.

By contrast, the majority erroneously flyspecks Columbia Union's characteristics. Rather than "paint[ing] a *general* picture of [Columbia Union]," *Roemer*, 426 U.S. at 758 (emphasis added), the majority picks and scratches at each individual factor. It is not surprising that it determines that no *particular* factor conclusively establishes Columbia Union's sectarian nature. After all, "[t]he relevant factors . . . are to be considered cumulatively." *Roemer*, 426 U.S. at 766 (internal quotation marks omitted). The majority's methodology, while not wholly irrele-

vant, is overly focused; it simply turns its microscope to too high a power.

Finally, the majority points to *Bowen* to bolster its claim that cases of this sort are inappropriate for summary judgment. *Ante* at 29. It is true that the Court in *Bowen* remanded for additional factfinding. The Court, however, was concerned primarily with the district court's failure to even "identify which grantees it was referring to" when it claimed that pervasively sectarian institutions had received aid. *Bowen*, 487 U.S. at 620. Moreover, while the Court noted that the district court had considered only two factors in making its pervasively sectarian determination, *id.* at 620 n.16, that clearly is not the case here.

B.

Let there be no mistake about the probable impact of the majority's decision. By requiring the parties to develop an even more exhaustive record through what is in effect a trial, the majority undermines the secular educational purpose of Maryland's Sellinger Program. Inevitably government efforts to assist private education are complicated by the need for officials to determine carefully the proper constitutional boundaries governing such assistance. This court's remand now increases the difficulty of that task exponentially. The majority sends the clear message that these Establishment Clause questions can only be satisfactorily resolved upon a voluminous record that requires a court to scrutinize a religious institution's sectarian character with laser-like precision. This decision, therefore, will substantially increase the administrative costs associated with educational programs like Maryland's. Of course, the likely consequence of requiring states to undertake such costly and involved inquiries in connection with each and every funding decision is that such programs might well be abandoned altogether. No

good deed, I suppose, goes unpunished: that Maryland's admirable attempt to support private higher education should become ensnared in the endless transaction costs of litigation is cause for dismay.

A remand is as unsatisfactory for the college as it is for the state. Requiring a lengthy trial on Columbia Union's sectarian character denigrates the very values underlying our Constitution's religion clauses. The First Amendment demands that the state "neither advance[] nor inhibit[] religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Specifically, the religion clauses ask, in part, whether institutions have "any incentive to modify their religious beliefs or practices in order to obtain . . . services." *Agostini*, 117 S. Ct. at 2014. The Court, when addressing this question, traditionally has analyzed an agency program. *See, e.g., id.* Nevertheless, judicially-created tests present similar dangers because, in order to protect their funding decisions from court scrutiny, agencies must apply court standards. Indeed, in reaching its determination that Columbia Union was a pervasively sectarian institution, MHEC considered evidence on each and every factor previously outlined by the Supreme Court in *Roemer*. A remand in this case, and the bureaucratic inquiries it will spawn in later cases, bode poorly for all religious institutions. The scrutiny the majority now demands will encourage them to disown their own religious character in order to gain funding. The result is an Establishment Clause jurisprudence that, far from maintaining government neutrality toward religion, is a ballista, affirmatively attacking an institution's religious foundation.

Thus, while the majority attempts to speak solely in terms of judicial involvement with religious institutions, *see ante* at 30 n.8, its decision plainly foreshadows further bureaucratic entanglement as well. The majority's

factfinding adventure cannot help but result in intensive government involvement in religion. The Court recognized in *Lemon* that "state inspection and evaluation of the religious content of a religious organization" poses the special danger that "pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses." 403 U.S. at 620. The unnecessary level to which the majority requires the district court, and by extension government agencies like MHEC, to inquire into Columbia Union's sectarian character contains just such a threat. The more our nation's federal courts and government agencies become enmeshed in questioning religious character, the more they will control that character.

I recognize that higher education does or at least should act in an environment of public accountability. Institutions that utilize public funds incur obligations to explain how they use those funds. Accreditation by its very nature requires some level of scrutiny into a college's academic offerings. Nonetheless, I am astounded that the majority desires further evidence on "how [Columbia Union's] traditional liberal arts or mandatory religion courses are taught." *Ante* at 23. It is unfortunate that the majority would require Columbia Union to present the minutiae of its classroom *modus operandi*. Will there now be state agents sitting in class, not for academic evaluation, but to police the degree to which religious values inform classroom instruction? This intrusion not only eclipses that which is present in the accreditation process; it is an intrusion to which religious organizations are to be uniquely and discriminatorily subject.

An equal danger looms with the majority's direction to the factfinder, and therefore funding agencies, to inquire whether "religious principles are important to the college"

and whether "religious indoctrination is more than a secondary objective." *Ante* at 22 (internal quotation marks omitted). Notwithstanding the majority's hope, *see ante* at 30 n.8, matters such as these are not amenable to stipulation. Thus, an agency will be left to determine when indoctrination becomes a primary objective. What does this mean? If college students "believe," will the state deny funding? The fact of the matter is that agencies are in no position to serve as Orwellian probes, measuring how seriously someone takes his or her religious convictions.

Additionally, the razor-thin line the majority cuts between pervasively sectarian and pervasively nonsectarian institutions belies credibility. For instance, the majority suggests that because "only about 350 to 400 of Columbia Union's 1172 students" actually participate in its mandatory religious services, Columbia Union might not be pervasively sectarian. *Ante* at 22. Does this mean that the college is prohibited from requiring 500 students to attend services? Would it be certain to receive funding if it limited the number to 200? Or, consider the majority's focus on the college's bulletin. *Ante* at 23. It intimates that the business department's use of "only two" religious references might somehow be dispositive. *Ante* at 24. Would one particularly emphatic reference, therefore, always pass constitutional muster? What about three? Constitutionality should not be made to hinge on such inconsequential distinctions.

Similarly, the majority's remand effectively dumps at the state's doorstep the volatile tasks of distinguishing between religious institutions and drawing controversial and delicate lines. Religious institutions will be without clear guidance as to when they might become too sectarian. The three Catholic colleges currently receiving funding—

Mount Saint Mary's College & Seminary, the College of Notre Dame of Maryland, and Loyola College—must now worry about whether they will at some indefinable point offend the state by stepping over the sectarian edge. For example, Mount Saint Mary's appoints the Archbishop of Baltimore as an automatic trustee and requires that at least one-fourth of its trustees, including the Archbishop, be ordained priests. Notre Dame requires that just under one-third of its trustees be nuns. And Loyola's president must be a member of the Society of Jesus. May Mount Saint Mary's raise its requirement to one-half? May Notre Dame increase its to more than one-third? May Loyola include the same prerequisite in its search for a vice president? How are these colleges to know? It will be impossible for them to predict at what point sectarian influences of this type will tip the scales. For religious institutions seeking Sellinger Program funds, the majority's remand simply raises more questions than it answers.

The "pervasively sectarian" test of *Hunt*, *Roemer*, and *Bowen* already places the judiciary in the uncomfortable role of determining just how religious an institution is, and requires that it draw somewhat arbitrary lines. But as long as directly controlling precedent requires such an inquiry, I would carefully shape the standards by which we measure an institution's sectarian nature such that the judiciary does not delve even deeper than necessary into religious inquiries we are likely most unqualified to answer. Cf. *Widmar v. Vincent*, 454 U.S. 263, 271 n.9 (1981) (termining the distinction between religious speech and religious worship "judicially unmanageable"). By requiring the district court to conduct a trial here, the majority has plunged government at all levels into the intimacies of religious faith. With respect, I would not choose that course.

III.

In a final plea to the Maryland Higher Education Commission for funding under the Sellinger Program, the president of Columbia Union College asked, "If we recant, would we qualify?" Those words capture what this case is about. Despite the fact that it has met all neutral criteria for state aid, and despite the fact that other religious institutions are receiving funding, Columbia Union has yet to receive so much as a penny in state assistance. The only way it could receive such aid is by compromising or abandoning its religious views. That to me is impermissible inhibition of religion, impermissible discrimination under our Constitution's religion clauses, and a violation of the First Amendment right to express religious beliefs. "That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). The Supreme Court in its recent enunciation of the neutrality principle has affirmed as much. But because the Court has not expressly overruled the funding prohibition principle in its First Amendment jurisprudence, I would affirm the judgment of the district court in this case.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. MJG-96-1831

COLUMBIA UNION COLLEGE,
Plaintiff

vs.

EDWARD O. CLARKE, JR., *et al.*,
Defendants

MEMORANDUM AND ORDER

The Court has before it Defendants' Motion for Summary Judgment, Columbia Union College's Cross-Motion for Summary Judgment, and the materials submitted by the parties relating thereto. The Court finds that a hearing is unnecessary.

I. BACKGROUND

In 1971, the Maryland General Assembly created a program of aid to nonpublic institutions of higher education, known since 1993 as the Joseph A. Sellinger Program ("Sellinger Program"). See Md. Code Ann. Educ. § 17-101 *et seq.* The aid under this program is in the form of annual payments of state funds directly to eligible institutions.

Authority to administer the Sellinger Program has been delegated to the Maryland Higher Education Commission ("the Commission"). Md. Code Ann. Educ. § 17-102.

To qualify for funds, an institution must: (1) be a non-profit private college or university that was established in Maryland before July 1, 1970; (2) be approved by the Commission; (3) be accredited; (4) have awarded the associate of arts or baccalaureate degrees to at least one graduating class; (5) maintain one or more programs leading to such degrees, other than seminarian or theological programs; and (6) submit each new program or major modification of an existing program to the Commission for its approval. Md. Code Ann. Educ. § 17-103. In addition, the statute commands that no Sellinger funds may be used for sectarian purposes. Md. Code Ann. Educ. § 17-107.

In January 1990, Plaintiff Columbia Union College, a private four-year college affiliated with the Seventh-day Adventist Church, applied for funds under the Sellinger Program. Plaintiff satisfied each of the statutory requirements for participation in the program. On March 24, 1992, however, the Commission concluded that because Plaintiff was a "pervasively sectarian" institution, the Establishment Clause of the First Amendment required that Plaintiff's application be denied.

On December 27, 1995, Plaintiff requested reconsideration of its application in light of the Supreme Court's then-recent decision in *Rosenberger v. Rectors and Bd. of Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995). On January 22, 1996, the Commission notified Plaintiff that "unless the nature and practices of Columbia Union have changed very substantially since 1992," there would not be any point in reapplying for aid.

In response, in June 1996, Plaintiff filed suit against the Commission seeking declaratory and injunctive relief for alleged constitutional and statutory violations. The Commission moved to dismiss on the ground that Plain-

tiff's claim was not ripe. On October 24, 1996, at a telephone conference with Judge Kaufman of this Court, it was agreed that Plaintiff would reapply for funds and that the Commission would consider that application on an expedited basis.¹ The parties agreed that the application would be considered without an administrative hearing.

Plaintiff submitted a new application for Sellinger funds on November 12, 1996.² On December 11, 1996, the Commission found that Plaintiff was still pervasively sectarian and denied its application.³

On December 24, 1996, Plaintiff filed an Amended Complaint ("Complaint") against Defendant Edward O. Clarke, Jr., in his official capacity, and the other members of the Maryland Higher Education Commission, in their official capacities, seeking declaratory and injunctive relief for alleged constitutional and statutory violations.⁴ In Count I, Plaintiff alleges that the Commission denied its application for funds in violation of Plaintiff's rights of free speech and association under the First and Four-

¹ Although he did not formally rule on the motion to dismiss, Judge Kaufman necessarily rendered it moot in reaching this accord. Indeed, it was the Court's explicit assumption that if Plaintiff's application was again denied, a new amended complaint would be filed immediately.

² Plaintiff requested \$806,079 for programs in mathematics, computer science, clinical laboratory science, respiratory care, and nursing. Commission's Exhibit D.

³ In fiscal year 1997, the Commission approved grants to three other colleges that have some religious affiliation: Loyola College, Mount St. Mary's College, and the College of Notre Dame. Commission's Exhibit S.

⁴ Although as a formal matter, the Commission itself is not a defendant, its members have been sued solely in their official capacities as members of the Commission. Therefore, for convenience, the Court will refer to the defendants collectively as "the Commission."

teenth Amendments. In Count II, Plaintiff contends that this denial deprived it of its rights under the Free Exercise Clause of the First Amendment, made applicable to the states via the Fourteenth Amendment. In Count III, Plaintiff asserts that the denial of its application violated the Equal Protection Clause of the Fourteenth Amendment.

In Count IV, Plaintiff alleges a violation of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb, *et seq.* In light of the Supreme Court's recent decision that Congress exceeded its constitutional authority in enacting RFRA, Count IV must be dismissed. *See City of Bourne v. Flores*, 117 S. Ct. 2157, 2160 (1997).

Both Plaintiff and the Commission now move for summary judgment on the remaining counts.

II. LEGAL STANDARD

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. A party seeking summary judgment "has the burden of showing the absence of any genuine issue of material fact and that he is entitled to judgment as a matter of law." *Barwick v. Celotex Corp.*, 736 F.2d 946, 958 (4th Cir. 1984).

In this case, no party contends that there is any genuine issue of material fact. Accordingly, disposition on summary judgment is appropriate.

III. DISCUSSION

A. *Columbia Union College As a Pervasively Sectarian Institution*

Under the Establishment Clause, a state may not directly fund institutions that are so "pervasively sectarian" that religion permeates even the secular facets of the institutions. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976). Put another way, a state may not fund an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. *Hunt v. McNair*, 413 U.S. 734, 743 (1973). By contrast, if an institution is not pervasively sectarian, its secular activities may be funded. *Roemer*, 426 U.S. at 755.

Because the secular and religious aspects of pervasively sectarian institutions are inextricably intertwined, there is a risk that direct government funding, "even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's 'religious mission.'" ⁵ *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988). Such direct funding, therefore, violates the Establishment Clause, as it has the impermissible primary effect of advancing religion.⁶ *Bowen*, 487 U.S. at 610; *Hunt*, 413 U.S. at 743.

⁵ Plaintiff's argument that the Commission does not "trust" Columbia Union College to use state funds only for secular purposes is immaterial. See Columbia Union College's Brief in Support of Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's Brief") at 12. Given the Supreme Court's pronouncements that no state funds at all may be given to pervasively sectarian institutions, Plaintiff's "trustworthiness" is not at issue.

⁶ A government policy must pass the oft-cited three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in order to pass constitutional muster under the Establishment Clause: "First, the

In order to determine if a particular college or university is so "pervasively sectarian" that it may not receive any direct state funding, the Court must "paint a general picture of the institution, composed of many elements." *Roemer*, 426 U.S. at 758. In analyzing the four Catholic colleges before it, the *Roemer* court considered a variety of factors before concluding that the colleges were not pervasively sectarian. These factors were:

- (1) the colleges' high degree of "institutional autonomy" from the Catholic Church; (2) the fact that attendance at religious services was not mandatory; (3) the fact that the colleges' mandatory religion courses merely supplemented broad liberal arts programs; (4) its finding that the colleges' nontheology courses were taught in an "atmosphere of intellectual freedom" and without "religious pressures;" (5) the fact that although some classes began with prayer, there were no policies encouraging the practice; (6) the fact that some instructors wore clerical garb and some classrooms contained religious symbols; (7) the colleges' faculty hiring decisions were not made on a religious basis; and (8) the student bodies were chosen without regard to religion.

Id. at 755-58.

After a review of the undisputed factual record, the Court concludes that Columbia Union College is a pervasively sectarian institution.⁷ Its religious components

[governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster an excessive government entanglement with religion." *Id.* at 612-13.

⁷ Plaintiff appears to be correct that, to date, the Supreme Court has not found any college or university, as opposed to a primary

are so inextricably intertwined with its secular aspects that, under the Establishment Clause, it may not receive any direct state funding.

Plaintiff is not "characterized by a high degree of institutional autonomy," as were the colleges in *Roemer*. *Id.* at 755. For the fiscal year ending on June 30, 1996, Plaintiff received approximately \$2.5 million in revenue, or about 21.5% of its total unrestricted educational and general revenues, in the form of "Church Subsidies & Gifts." Commission's Exhibit G. In addition, under Plaintiff's bylaws, at least 34 out of the 38 voting members of its Board of Trustees must be members of the Seventh-day Adventist Church. Commission's Exhibit F at 10. In *Roemer*, on the other hand, none of the colleges received funds from or made reports to the Catholic Church. The Church was represented on the colleges' governing boards, but the Court found that Church considerations did not enter into college decisions. *Roemer*, 426 U.S. at 755.

The Supreme Court, in 2 cases prior to *Roemer*, concluded that several colleges, who were arguably under more control by their affiliated church than Plaintiff, were not pervasively sectarian. In *Hunt v. McNair*, 413 U.S. 734 (1973), the Court concluded that the Baptist College at Charleston was not pervasively sectarian, even though the college's Board of Trustees were elected by the South Carolina Baptist Convention, certain financial transactions required Convention approval, and only the Convention could amend the charter of the college. *Id.* at 743. Simi-

or secondary school, to be pervasively sectarian. See Plaintiff's Brief at 11. This fact, by itself, does not lead this Court to anything beyond the unremarkable conclusion that a case involving such an institution has not yet made its way onto the high Court's docket. It certainly does not mean that such an institution cannot exist. Indeed, the Plaintiff is a prime example of a pervasively sectarian college.

larly, the colleges at issue in *Tilton v. Richardson*, 403 U.S. 672 (1971), were governed by Catholic religious organizations. *Id.* at 686. These colleges' level of institutional autonomy, however, cannot be viewed in isolation. Taken in context, the colleges at issue in *Hunt* and *Tilton* were far less sectarian than Plaintiff.⁸ Therefore, viewing Plaintiff as a whole, its lack of institutional autonomy lends support to the overall conclusion that Plaintiff is pervasively sectarian.

In stark contrast to the Catholic colleges in *Roemer*, Plaintiff requires its students to attend religious services. Traditional students⁹ are required to attend chapel once a week and assemblies as scheduled. Plaintiff's Exhibit B at 19. Students who reside in the college's residence halls must also attend three out of six weekly worship options in the residence halls. Commission's Exhibit L at 15. Failure to attend these worship services, without adequate excuse, subjects a student to disciplinary action, including

⁸ In *Hunt*, there were no religious qualifications for faculty membership or student admission. In fact, the percentage of the student body that was Baptist was roughly equal to the percentage of Baptists in that geographic area. *Hunt*, 413 U.S. at 743-44. In addition, the Court held that, unlike the present case, there was no evidence beyond the college's lack of institutional autonomy to indicate that it was pervasively sectarian. *Id.* In *Tilton*, the Court held that the colleges' predominant educational mission was to provide secular educations to their students. The students were not required to attend religious services. While theology courses were mandatory, they were not limited to courses about Roman Catholicism and were taught according to the academic requirements of the discipline and the teacher's concept of professional standards. In addition, the schools subscribed to a well-established set of principles of academic freedom, and made no attempt to indoctrinate students or to proselytize. *Tilton*, 403 U.S. at 686-87.

⁹ About 675 students, out of a total enrollment of around 1172, are "traditional", 18-24 year old, students. Commission's Exhibit W at 2.

suspension or dismissal from the college.¹⁰ *Id.*; Plaintiff's Exhibit B at 19. Plaintiff is quite different from the colleges in *Roemer* which, rather than requiring church attendance, merely provided religious services for those students who were interested in voluntarily attending. See *Roemer*, 426 U.S. at 755.

Like the colleges in *Roemer*, Plaintiff requires students to take religion courses in order to graduate. In Plaintiff's 1996-97 Bulletin, the Religion Department states that it "believes that in a Christian college Christian principles should characterize every phase of college life, whether it be intellectual, physical, social, or moral." Commission's Exhibit H at 211. The department faculty, chosen in part because of "their dedication to Jesus Christ," seeks to "show [students] how Christian principles offer satisfactory answers to the perplexing problems facing the world today . . . [and] to inspire everyone to live a life wholly dedicated to the service of the Master." *Id.* This Court shares the *Roemer* court's concern that these religion courses could in practice be devoted to deepening students' religious experiences in the Seventh-day Adventist faith, rather than to teaching theology as an academic discipline. See *Roemer*, 426 U.S. at 756 n.20. While the *Roemer* court was satisfied that this danger did not, on its own, lead to the conclusion that the colleges at issue

¹⁰ Plaintiff's attempt to mitigate the effect of these policies is unpersuasive. Even if Plaintiff is relaxed enough about its excuse policy that only 350 to 400 of the approximately 675 traditional students actually attend services each Wednesday morning, chapel attendance is still officially mandatory. See Plaintiff's Brief at 18. A liberal excuse policy does not convert a mandatory attendance requirement into a policy of encouraging voluntary worship. Indeed, Plaintiff admits that worship attendance "is an important part of community activity at Columbia Union, and one in which the College's traditional students are required to participate." Plaintiff's Brief at 18.

were pervasively sectarian, this Court cannot reach the same conclusion with respect to Columbia Union College. Rather, these mandatory religion courses contribute to an overall mosaic that is pervasively sectarian.

While Plaintiff claims to foster an atmosphere of intellectual freedom, its Policy Handbook for Administration and Faculty directs faculty members to "bear in mind their peculiar obligation as Christian scholars and members of a Seventh-day Adventist College." Commission's Exhibit N at 2. In exercising their rights and responsibilities, faculty members "have complete freedom so long as their speech and actions are in harmony with the philosophies and principles of the college—a Seventh-day Adventist institution of higher educ[a]tion." ¹¹ *Id.*

Furthermore, the descriptions of several of Plaintiff's nominally secular academic departments are replete with references to religion. For instance, the business department's goal, in addition to graduating students with the requisite technical competence and preparedness, is to instill students with "an approach to people, work, and life that demonstrates outstanding Christian values and

¹¹ Plaintiff does not subscribe to the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors. Cf. *Roemer*, 426 U.S. at 756. Instead, it claims that its policies are consistent with that statement. Plaintiff's Brief at 21. The 1940 AAUP statement allows some limitations on academic freedom because of religious or other aims of the institution. Plaintiff's Exhibit H. The AAUP 1970 Interpretive Comments disavow this limitation on academic freedom. See Defendants' Reply Memorandum in Support of Motion for Summary Judgment ("Commission's Reply"), Exhibit A at 6. Whether or not the 1970 comments alter the tenets of the 1940 statement need not be decided. The true issue before the Court is not whether Plaintiff's policies mimic the AAUP statement, but rather whether Plaintiff fosters an environment of intellectual freedom among its faculty. Plaintiff's Policy Handbook calls into question its commitment to academic freedom.

ethics." Commission's Exhibit H at 96. Similar religious references pervade the descriptions of other traditionally secular departments. *See, e.g., id.* at 142 (education), 176 (liberal studies), 196 (nursing), 207 (psychology).

Finally, unlike the colleges in *Roemer* and *Hunt*, faculty hiring and student admissions decisions do not appear to be made without regard to religion. Plaintiff's Human Rights Policy reserves the right "to give preference in employment of faculty and staff and admission of students to members of the [Seventh-day Adventist Church]." Plaintiff's Exhibit B at 12. In fact, 36 out of 40 full-time faculty members are Seventh-day Adventists. Plaintiff's Exhibit C, ¶ 4. If part-time faculty members are included, 57% of the total faculty are Seventh-day Adventists. *Id.* Once faculty members are hired, they are evaluated in part based on whether they stress Christian values and philosophy in the classroom. *See* Commission's Exhibit N, App. I (statement of criteria for determining faculty excellence and forms for student evaluation of an instructor).

As to the student body, 80% of traditional students, and 20% of the evening students, are Seventh-day Adventists.¹² Commission's Exhibit W at 2. This fact, on its own, is not dispositive as the great majority of the students at each of the colleges in *Roemer* were Roman Catholic. *Roemer*, 426 U.S. at 757. However, Plaintiff's admission application asks applicants to state their religious affiliation. Commission's Exhibit I. Furthermore, Plaintiff states in its Bulletin that it "welcomes applica-

¹² Plaintiff does not argue that the evening program could be eligible for state funds even if the remainder of the school is pervasively sectarian. Nor could it, as the Supreme Court has made clear that if an institution is pervasively sectarian, even its secular components can receive no direct state funding. *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988).

tions from all students whose principles and interests are in harmony with the policies and principles" expressed in the Bulletin. Commission's Exhibit H at 15. These "policies and principles," in turn, are interpreted in light of the Seventh-day Adventist Church's religious and moral teachings. *Id.* The Court must conclude that religion plays a role in faculty hiring and student admissions decisions.

Plaintiff's reliance on *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986), is misplaced. In *Witters*, Washington's statute provided state funds for vocational rehabilitation assistance for the blind. Washington refused to give aid to Witters because he was studying at a religious school to be a pastor, missionary, or youth director. The Court held that the Establishment Clause did not bar Witters from receiving state aid, even though he planned to use the funds for his religious education. *Id.* at 753.

Under the Washington statute, state funds were paid directly to the student, who then transmitted them to the educational institution of his choice.¹³ *Witters*, 474 U.S. at 488. The decision to give funds to an admittedly religious institution, therefore, was a private choice made by the individual, not a choice made by the state. *Id.* It thus made no difference whether the institution receiving the funds was pervasively sectarian. The situation was no different from a government employee's taking her

¹³ Even if Plaintiff is correct that, in actuality, the funds under the Washington statute were paid directly to the institution, the Supreme Court based its holding and reasoning on its understanding that such funds were instead paid to the individual, who was then free to use them at any school that he wished. *Witters*, 474 U.S. at 488; *Agostini v. Felton*, 117 S. Ct. 1997, 2011 (1997); *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2526 (1995) (O'Connor, J., concurring).

paycheck and choosing to donate part or all of it to a church or other religious organization. See *Agostini v. Felton*, 117 S. Ct. 1997, 2011 (1997) (discussing *Witters*). By contrast, in the instant case, the state itself is being asked to directly fund a pervasively sectarian institution.¹⁴ Such funding is forbidden by the Establishment Clause.¹⁵ *Rosenberger*, 115 S. Ct. at 2523; *Roemer*, 426 U.S. at 755.

In sum, the Court finds that Columbia Union College is a pervasively sectarian institution. The Commission, therefore, was barred by the Establishment Clause from providing funds under the Sellinger Program to Plaintiff.

B. Plaintiff's Free Speech and Association Claim

In Count I, Plaintiff alleges that the Commission denied it funds under the Sellinger Program solely based on "the content or viewpoint of plaintiff's speech, communications, identity, activities, or affiliation." Complaint ¶ 30. Government discrimination against particular speech because of its content or viewpoint violates the First Amendment unless the state can show that its policy is necessary to serve a compelling state interest and is narrowly tailored to achieve that end. See, e.g., *Arkansas Writers' Project*,

¹⁴ The fact that the precise amount that an institution receives is based in part on the number of students enrolled in particular programs, see Md. Code Ann. Educ. § 17-104, does not make the Sellinger Program like the program in *Witters*. In *Witters*, the decision to give any funds at all to the religious institution was made by a private individual. By contrast, in the instant case, while private choices may impact the ultimate amount that an institution receives, it would nonetheless be the state's decision to directly fund the pervasively sectarian institution in the first place.

¹⁵ Contrary to Plaintiff's assertions, *Agostini* and *Rosenberger* do not diminish the viability of the "pervasively sectarian" line of cases. In both cases, the Court took pains to note that no public funds were distributed directly to religious institutions. *Agostini*, 117 S. Ct. at 2013; *Rosenberger*, 115 S. Ct. at 2523. The *Roemer* line of cases, therefore, were not implicated.

Inc. v. Ragland, 481 U.S. 221, 231 (1987); *American Life League, Inc. v. Reno*, 47 F.3d 642, 648 (4th Cir. 1995).

Assuming for the purposes of discussion that the Commission's denial of funding to Plaintiff constituted content or viewpoint discrimination, the Commission's actions were nonetheless justified, as they were necessary to achieve its compelling interest in complying with the Establishment Clause. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). Because the Commission's decision did nothing more than put into effect the Supreme Court's pronouncements that no state funds at all may be given directly to pervasively sectarian institutions, it was narrowly tailored to achieve that end. See *American Life League*, 47 F.3d at 652.

Notwithstanding Plaintiff's protestations to the contrary, the Supreme Court's decision in *Rosenberger* does not alter this analysis. In *Rosenberger*, the Court of Appeals had held that the university's refusal to pay the printing costs of a student publication because of its Christian viewpoint, while generally paying the printing costs of other student publications, violated the publication's free speech rights. This violation, however, was justified by the university's need to comply with the Establishment Clause. The Supreme Court reversed, holding that the publication's free speech rights had been violated, but that there was no Establishment Clause justification. *Rosenberger*, 115 S. Ct. at 2525. The Court did not hold, however, that compliance with the Establishment Clause is insufficient to justify a restriction on free speech. Rather, it held that, on the facts before, there was no such justification. *Id.* at 2524-25.

In doing so, the Court reaffirmed the validity of the principle that direct money payments to pervasively sec-

tarian institutions offend the Establishment Clause. *Id.* at 2523. This principle was simply inapplicable as the Court was not then confronted with a situation in which the government was making direct money payments to an institution engaged in religious activity. *Id.* The Court chided the dissent and the Court of Appeals for failing to recognize "the undisputed fact that no public funds flow[ed] directly to [the publication's] coffers." *Id.* *Rosenberger* therefore does not undermine the conclusions that no state funds may be given directly to Plaintiff, a pervasively sectarian college, or that the Commission's need to comply with the Establishment Clause is a sufficiently compelling interest to justify an assumed violation of Plaintiff's rights to free speech and association. *See id.* at 2528 (O'Connor, J., concurring) ("The Court's decision today therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence.").

Plaintiff also alleges in its Complaint that the Commission's guidelines and definitions for allocating Sellinger funds are unlawfully vague and overbroad. Complaint ¶ 32. Plaintiff appears to have abandoned these arguments, as not a single word in any of its materials in opposition to the Commission's motion or in support of its own cross-motion is devoted to them. In any event, Plaintiff's arguments that the Commission's policies are either overbroad or vague are plainly without merit. The Commission's policy of completely refusing to fund pervasively sectarian institutions is not overbroad. Rather, it is mandated by the Establishment Clause. The Establishment Clause simply does not allow the Commission to give any state funds to Plaintiff, not even funds earmarked for secular purposes.

Nor have the Commission's regulations and guidelines been shown to be unconstitutionally vague. Indeed, they are not even truly at issue. It is the Establishment Clause itself, and the Supreme Court's interpretations thereof, that mandated the Commission's decision. Any "vagueness" there may be lies not with the Commission's regulations and guidelines, but with the governing Establishment Clause jurisprudence.

Therefore, the Commission is entitled to summary judgment on Count I.

C. Plaintiff's Free Exercise of Religion Claim

In Count II, Plaintiff alleges that the Commission impermissibly denied it funds under the Sellinger Program "based upon plaintiff's religious beliefs, character, affiliation, speech, and association" in violation of the Free Exercise Clause of the First Amendment. Complaint ¶¶ 35-36.

A neutral, generally applicable government action does not offend the Free Exercise Clause, even if it has an incidental effect on religious practice. *Goodall by Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 170 (4th Cir. 1995) ("*Goodall II*"), citing *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 878-79 (1990). If a government action is not neutral and generally applicable, and thus imposes a substantial burden on religious practice, it violates the Free Exercise Clause unless the state can show that it is justified by a compelling interest and narrowly tailored to achieve that interest. *Goodall II*, 60 F.3d at 171-73; *Goodall by Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363, 369-70 (4th Cir. 1991) ("*Goodall I*").

Assuming *arguendo* that the Commission's decision should be subject to strict scrutiny, Plaintiff still cannot

prevail on its Free Exercise claim. The Commission's complete denial of Plaintiff's application for Sellinger funds was necessary to comply with the Establishment Clause and narrowly tailored to achieve that interest. It is well-settled in the Fourth Circuit that the avoidance of a violation of the Establishment Clause is a compelling state interest justifying an alleged burden on the free exercise of religion. *Goodall I*, 930 F.2d at 370; *Smith v. County of Albemarle*, 895 F.2d 953, 959-60 (4th Cir. 1991). Therefore, the Commission is entitled to summary judgment on Count II.

D. Plaintiff's Equal Protection Claim

In Count III, Plaintiff asserts that the Commission's actions violated Plaintiff's rights under the Equal Protection Clause of the Fourteenth Amendment by treating Plaintiff differently from other similar situated colleges and universities on the basis of its religious beliefs. Complaint ¶¶ 42-44.

If the Commission's actions created a suspect classification or infringed on a fundamental right, they would be subject to strict scrutiny. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338-39 (1987). On the other hand, if neither a suspect class nor a fundamental right are involved, the Commission's actions need only be rationally related to a legitimate state interest. *Roller v. Gunn*, 107 F.3d 227, 233 (4th Cir. 1997).

The Court will assume for the moment that Plaintiff and the colleges that received Sellinger funds are similarly situated. Further, the Court will assume that the Commission's actions created a suspect classification or burdened a fundamental right, thereby triggering strict scrutiny. Plaintiff's Equal Protection claim fails nonetheless.

As noted above, the Commission's actions were justified by its compelling interest in complying with the Establishment Clause. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). Conversely, if strict scrutiny is inappropriate, the Commission's denial of Plaintiff's application for Sellinger funds is certainly rationally related to its legitimate interest in compliance with the mandate of the Establishment Clause.

Therefore, the Commission is entitled to summary judgment on Count III.

IV. CONCLUSION

For the foregoing reasons:

1. Defendants' Motion for Summary Judgment is GRANTED.
2. Columbia Union College's Cross-Motion for Summary Judgment is DENIED.
3. Judgment shall be entered by separate Order.

SO ORDERED this 28th day of October, 1997.

/s/ Marvin J. Garbis
MARVIN J. GARBIS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. MJG-96-1831

COLUMBIA UNION COLLEGE,
Plaintiff

vs.

EDWARD O. CLARKE, JR., *et al.*,
Defendants

ORDER

The Court has, this date, granted summary judgment to the Defendants. Accordingly, Judgment is hereby entered in favor of Defendants Edward O. Clarke, Jr., the Honorable J. Glenn Beall, Jr., Dorothy Dixon Chaney, Donna H. Cunninghame, John L. Green, Jamie Kendrick, Terry L. Lierman, Osborne A. Payne, R. Kathleen Perini, Charles B. Saunders, Jr., Richard P. Street, Jr., and Albert Nathaniel Whiting and against Plaintiff Columbia Union College:

1. Dismissing all claims with prejudice and
2. Awarding the Defendants their assessable costs.
3. This Order shall be deemed to be a final judgment within the meaning of Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this 28th day of October, 1997.

/s/ Marvin J. Garbis
MARVIN J. GARBIS
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. MJG-96-1831

COLUMBIA UNION COLLEGE,
Plaintiff

vs.

EDWARD O. CLARKE, JR., *et al.*,
Defendants

ORDER STAYING AND
ADMINISTRATIVELY CLOSING CASE

It appears that the parties to this case agree that the case should remain closed until Plaintiff's petition for writ of certiorari is resolved by the United States Supreme Court. Accordingly:

1. This case is STAYED pending proceedings in the United States Supreme Court.
2. The Clerk of the Court shall ADMINISTRATIVELY CLOSE this case for possible reopening pursuant to further Order of this Court upon the application (by December 31, 2000) of any party hereto based upon the resolution of the Supreme Court proceedings or other good cause.
3. The administrative closing of this case shall not affect any rights of the parties in this, or any other, proceeding.

4. The administrative closing of this case shall not prevent the parties from proceeding, by agreement, with discovery or the taking of testimony for use at trial in this case while the interlocutory appeal is pending.

SO ORDERED this 29th day of January, 1999.

/s/ Marvin J. Garbis
MARVIN J. GARBIS
United States District Judge

APPENDIX D

FILED December 22, 1998

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2656
CA-96-1831-MJG

COLUMBIA UNION COLLEGE,
Plaintiff-Appellant

v.

EDWARD O. CLARKE, JR., in his official capacity as a member of the Maryland Higher Education Commission; J. GLENN BEALL, JR., Honorable, in his official capacity as a member of the Maryland Higher Education Commission; DOROTHY DIXON CHANEY, in her official capacity as a member of the Maryland Higher Education Commission; DONNA H. CUNNINGHAME, in her official capacity as a member of the Maryland Higher Education Commission; JOHN J. GREEN, in his official capacity and as a member of the Maryland Higher Education Commission; JAMIE KENDRICK, in his official capacity and as a member of the Maryland Higher Education Commission; TERRY L. LIERMAN, in his official capacity and as a member of the Maryland Higher Education Commission; OSBORNE A. PAYNE, in his official capacity and as a member of the Maryland Higher Education Commission; R. KATHLEEN PERINI; CHARLES B. SAUNDERS, JR., in his official capacity and as a member of the Maryland Higher Education Commission; RICHARD P. STREET, JR., in his official ca-

capacity and as a member of the Maryland Higher Education Commission; ALBERT NATHANIEL WHITING, in his official capacity and as a member of the Maryland Higher Education Commission,

Defendants-Appellees

CHRISTIAN LEGAL SOCIETY; THE COALITION FOR CHRISTIAN COLLEGES & UNIVERSITIES; UNION OF ORTHODOX JEWISH CONGREGATION OF AMERICA; THE AMERICAN JEWISH CONGRESS; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; THE ANTI-DEFAMATION LEAGUE,

Amici Curiae

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Appellant filed a petition for rehearing and rehearing en banc.

Judge Wilkinson voted to grant panel rehearing. Judges Butzner and Motz voted to deny.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc. Chief Judge Wilkinson and Judge Niemeyer voted to rehear the case en banc, and Judges Widener, Murnaghan, Ervin, Wilkins, Hamilton, Luttig, Williams, Michael, Motz, Traxler and King voted against rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Motz for the Court.

For the Court,

/s/ Patricia S. Connor
Clerk

Yours truly,
PATRICIA S. CONNOR
Clerk

By: /s/ Amelia Brandon
Deputy Clerk

Enclosure(s)
cc: Frank L. Monge

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APPENDIX E

FILED December 30, 1998

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2656
CA-96-1831-MJG

COLUMBIA UNION COLL.

v.

EDWARD O. CLARKE, JR.

MANDATE

The judgment of this Court dated 10/26/98 takes effect today.

PATRICIA S. CONNOR
Clerk

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APPENDIX F

THE ANNOTATED CODE
OF THE PUBLIC GENERAL LAWS
OF MARYLAND

Education

ENACTED BY CHAPTER 22, ACTS 1978

TITLE 17.

FINANCIAL AID TO INSTITUTIONS OF HIGHER EDUCATION.

Subtitle 1. Aid to Nonpublic Institutions.

§ 17-101. Program established.

There is a program of State aid to nonpublic institutions of higher education. (An. Code 1957, art. 77A, § 65; 1978, ch. 22, § 2; 1988, ch. 246, § 2.)

§ 17-102. Administration of program.

Subject to review by the Board of Public Works, the Maryland Higher Education Commission shall adopt standards and procedures, not inconsistent with this subtitle, to implement and administer the aid program provided for by this subtitle, including standards and procedures for:

- (1) Submitting applications for aid;
- (2) Verifying full-time equivalent student enrollment by institutions that apply for aid;

(3) Submitting reports or data on the use of this money by the institutions that receive it; and

(4) Paying the aid to the institutions during the fiscal year. (An. Code 1957, art. 77A, § 68; 1978, ch. 22, § 2; 1987, ch. 641; 1988, ch. 246, § 2.)

§ 17-103. Eligibility for aid.

(a) *Determination.*—The Maryland Higher Education Commission shall determine which institutions are eligible for aid under this subtitle.

(b) *Standards.*—To qualify for State aid under this subtitle, an institution of higher education shall:

(1) Be:

(i) A nonprofit private college or university that was established in the State before July 1, 1970;

(ii) A nonprofit private institution of higher education that formerly received State aid as a component of a private college or university that was established in this State before July 1, 1970; or

(iii) A private nonprofit institution of higher education that is established in this State and grants an associate of arts degree;

(2) Be approved by the Maryland Higher Education Commission;

(3) Be:

(i) Accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools; or

(ii) 1. A candidate for accreditation under subparagraph (i) of this paragraph;

2. Subject to an affirmative action plan approved by the Maryland Higher Education Commission; and

3. Authorized by the Maryland Higher Education Commission for participation in the program established under this subtitle.

(4) Have awarded the associate of arts or baccalaureate degrees to at least one graduating class;

(5) Maintain one or more earned degree programs, other than seminarian or theological programs, leading to an associate of arts or baccalaureate degree; and

(6) Submit each new program and each major modification of an existing program to the Maryland Higher Education Commission for its review and recommendation as to the initiation of the new or modified program. (An. Code 1957, art. 77A, §§ 65, 66; 1978, ch. 22, § 2; 1981, ch. 2, § 3; 1982, ch. 657; 1988, ch. 246, §§ 2, 4; ch. 730; 1989, ch. 5, §§ 1, 9.)

§ 17-104. Amount of aid [Amendment subject to termination].

(a) *In general.*—The Maryland Higher Education Commission shall compute the amount of the annual apportionment for each institution that qualifies under this subtitle by multiplying:

(1) The number of full-time equivalent students enrolled at the institution during the fall semester of the fiscal year preceding the fiscal year for which the aid apportionment is made, as determined by the Maryland Higher Education Commission times;

(2) An amount equal to 16 percent of the State's General Fund per full-time equivalent student appropriation to the 4-year public institutions of higher education in this State for the preceding fiscal year.

(b) *Exclusion of theological and seminarian students.*—Full-time equivalent students enrolled in seminarian or theological programs shall be excluded from the computation required by subsection (a) of this section.

(c) *Exclusion of private donation incentive program payments.*—Payments of State General Funds under Subtitle 3 of this title shall be excluded from the computation required by subsection (a) of this section. (An. Code 1957, art. 77A, § 67; 1978, ch. 22, § 2; 1985, ch. 158; 1988, ch. 246, § 2; 1989, ch. 94.)

(Termination of amendment effective July 1, 1997.)

§ 17-104. Amount of aid.

(a) *In general.*—The Maryland Higher Education Commission shall compute the amount of the annual apportionment for each institution that qualifies under this subtitle by multiplying:

(1) The number of full-time equivalent students enrolled at the institution during the fall semester of the fiscal year preceding the fiscal year for which the aid apportionment is made, as determined by the Maryland Higher Education Commission times;

(2) An amount equal to 16 percent of the State's General Fund per full-time equivalent student appropriation to the 4-year public institutions of higher education in this State for the preceding fiscal year.

(b) *Exclusion of theological and seminarian students.*—Full-time equivalent students enrolled in seminarian or theological programs shall be excluded from the computation required by subsection (a) of this section.

(c) *Exclusion of private donation incentive program payments.*—Terminated.

(1989, ch. 94.)

§ 17-105. Certification and payment of aid; reductions for unreasonably duplicative programs.

(a) *Certification to Governor.*—The Maryland Higher Education Commission shall certify the amount of aid due each institution under this subtitle to the Governor, who shall include the total amount in the annual budget submission.

(b) *Reduction of appropriation for unreasonably duplicative programs.*—If a nonpublic institution of higher education has implemented a new or substantially modified program contrary to the recommendation of the Maryland Higher Education Commission that was based on a finding of unreasonable duplication, then the Maryland Higher Education Commission may recommend that the General Assembly reduce the appropriation by the amount of aid associated with the full-time equivalent enrollment in that program. This provision does not preclude the nonpublic institution from going forward with implementation of the new or substantially modified program.

(c) *Certification to State Comptroller; payment.*—The Maryland Higher Education Commission shall certify the amount of aid due each institution, less any reduction made by the General Assembly under subsection (b) of this section, to the State Comptroller, who shall pay it from appropriations made for this program under the normal budgetary procedures.

(d) *Reapplication for reconsideration of programs.*—(1) If the General Assembly reduces program funding under subsection (b) of this section, the affected nonpublic institution annually may reapply to the Maryland Higher Education Commission for reconsideration of the program recommendation.

(2) If the Commission determines that the unreasonable duplication no longer exists, then the Commission may recommend that there be no reduction in the institution's amount of aid. (1988, ch. 246, § 2.)

§ 17-106. Purchases through Department of General Services.

Subject to the initial approval of the Secretary of General Services, an institution that qualifies for aid under this subtitle may make any purchase through the Department of General Services in accordance with the rules and regulations of that Department. (An. Code 1957, art. 77A, § 96; 1978, ch. 22, § 2; 1978, ch. 378; 1988, ch. 246, § 2.)

§ 17-107. Money not to be used for sectarian purposes.

An institution may not use money payable or goods purchased under this subtitle for sectarian purposes. (An. Code 1957, art. 77A, §§ 68A, 96; 1978, ch. 22, § 2; 1988, ch. 246, § 2.)

Subtitle 2. Eminent Scholar Program.

§ 17-201. Established.

There is an Eminent Scholar Program to give public institutions of higher education the opportunity to attract and keep faculty who have achieved national eminence in their disciplines. (An. Code 1957, art. 77A, § 64B; 1978, ch. 22, § 2.)

§ 17-202. Qualifications of institutions.

(a) *Eligibility.*—Each public institution of higher education may participate in the Eminent Scholar Program.

(b) *Institution to adopt standards for appointment.*—The governing body of each institution that participates

in the Program shall adopt standards and procedures for attracting and keeping eminent scholars in this State that include the following concepts:

(1) The appointee shall hold the rank of associate or full professor, or its equivalent, such as artist in residence;

(2) The appointee shall have achieved national eminence in his discipline as judged by his peers; and

(3) The "eminence" of the appointee:

(i) Shall be judged, generally, on evidence of effective teaching and productive research as attested to by his peers; and

(ii) If appropriate, may be judged on the basis of artistic achievement or distinguished accomplishments in areas that lie beyond academic endeavor but for which there is concrete evidence of superior talent. (An. Code 1957, art. 77A, § 64B; 1978, ch. 22, § 2.)

Subtitle 1. Aid to Nonpublic Institutions.

§ 17-101. Joseph A. Sellinger Program established.

There is a program of State aid to nonpublic institutions of higher education known as the Joseph A. Sellinger Program. (An. Code 1957, art. 77A, § 65; 1978, ch. 22, § 2; 1988, ch. 246, § 2; 1993, ch. 1.)

§ 17-104. Amount of aid [Amendment subject to termination].

* * * *

§ 17-303. Audit [Subtitle subject to termination].

An affiliated foundation of an eligible institution that receives State payments shall provide the Maryland

Higher Education Commission an annual audit of all pledged and paid amounts and their sources and a copy of the annual audit shall be provided to the Legislative Auditor. (1989, ch. 94.)

§ 17-304. Application of payments; appropriations; reversion of funds [Subtitle subject to termination].

(a) *Appropriation of payments.*—Amounts paid by the State under this subtitle may be applied to any eligible program at the eligible institution to which the payment is made.

(b) *Appropriations; reversion of funds.*—No more than one-half of the total amount to be paid by the State under provisions of this subtitle may be appropriated in any fiscal year. The provisions of § 7-302 of the State Finance and Procurement Article do not apply to unused program funds. (1989, ch. 94.)

§ 17-305. Reduction of State support [Subtitle subject to termination].

Amounts paid by the State to any eligible institution under this subtitle may not directly or indirectly reduce the State General Fund or Capital Fund support for the eligible institution. (1989, ch. 94.)

§ 17-306. Regulations; reports [Subtitle subject to termination].

The Maryland Higher Education Commission shall:

(1) Adopt regulations necessary for the administration of this subtitle; and

(2) Submit to the Governor by December 1, 1991, a report evaluating the program under this subtitle and

containing recommendations as to whether it would be extended. (1989, ch. 94.)

(Termination of subtitle effective July 1, 1997.)

Subtitle 3. Private Donation Incentive Program.

§§ 17-301 to 17-306. Private donation incentive program.

Terminated.

Title 13B

MARYLAND HIGHER EDUCATION COMMISSION

Subtitle 01 NONPUBLIC SCHOOLS

Chapter 02 Joseph A. Sellinger Program—Aid to
Nonpublic Higher Education Institutions

Authority: Education Article, § 17-102,
Annotated Code of Maryland

.01 Applicability; Effective Date.

The criteria and procedures contained in this chapter apply to the program of aid to nonpublic institutions of higher education provided for by Education Article, § 17-101 et seq., Annotated Code of Maryland. These amended criteria and procedures are effective beginning with the expenditure, reporting, and verification of aid awarded for the 1994 fiscal year.

.02 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Commission" means Maryland Higher Education Commission.

(2) "Eligible institution" means an institution of higher education satisfying the requirements of Regulation .03 of this chapter.

(3) "Program" or "academic program" means a series of courses which are arranged in a scope and a sequence leading to a degree or certificate, or which constitute a major.

(4) "Religious, seminarian, or theological academic programs" means a series of courses which are arranged in a scope and a sequence either leading to a degree or certificate which indicates specialization in the study of religion or in religious, seminarian, or theological studies, or which constitute a major in any of these subject matters.

(5) "State's general fund per full-time equivalent student appropriation for the 4-year public colleges and universities" means the general fund per full-time equivalent student appropriations for Bowie State University, Coppin State College, Frostburg State University, Morgan State University, Salisbury State University, St. Mary's College of Maryland, Towson State University, University of Maryland College Park, University of Maryland Baltimore County, and University of Maryland Eastern Shore.

.03 Qualifications for Aid.

A. The Commission shall determine which institutions are eligible for aid under this chapter.

B. To qualify for State aid under this chapter, an institution of higher education shall:

(1) Be a nonprofit private:

(a) College or university that was established in the State before July 1, 1970,

(b) Institution of higher education that formerly received State aid as a component of a private college or university that was established in this State before July 1, 1970, or

(c) Institution of higher education that is established in this State and grants an associate of arts degree;

(2) Be approved by the Commission;

(3) Be:

(a) Accredited by the Commission on Higher Education of the Middle States Association of Colleges and Schools, or

(b) A candidate for accreditation under § B(3)

(a) of this regulation that is subject to an affirmative action plan approved by the Commission, and is authorized by the Commission for participation in the program established under this chapter;

(4) Have awarded the associate of arts or baccalaureate degrees to at least one graduating class;

(5) Maintain one or more earned degree programs, other than seminarian or theological programs, leading to an associate of arts or baccalaureate degree; and

(6) Submit each new program and each major modification of an existing program to the Commission for its review and recommendation as to the initiation of the new or modified program.

.04 Computation of Amount of Annual Award.

A. The Commission shall determine the annual apportionment available to each eligible institution in accordance with this regulation.

B. Eligible Credit Hours Generated.

(1) The number of eligible credit hours generated in an institution during the fall semester or quarter of the fiscal year next preceding the fiscal year for which the apportionment is to be made shall be computed by adding the number of:

(a) Credit hours of enrollment in undergraduate courses regardless of student level;

(b) Credit hours of enrollment in graduate courses regardless of student level; and

(c) Equated credit hours of enrollment in special courses.

(2) From the sum reached in § B(1) of this regulation, subtract all credit hours, regardless of subject, taken by:

(a) Undergraduates then enrolled in a religious, seminarian, or theological academic programs; and

(b) Graduate students then enrolled in a religious, seminarian, or theological academic program.

C. Special Considerations for Determining Eligible Credit Hours Generated.

(1) Equated credit hours of enrollment in special courses are computed on the same basis as for a normal course. For example, if 3 weekly contact hours of English 101 equals 3 credits, then 3 weekly contact hours of prerequisite noncredit English are equated to 3 credit hours.

(2) Credit hours for short courses are prorated on the basis of a full semester. For example, if the full semester course carrying 3 weekly contact hours is for 16 weeks, and the short course is for 8 weeks, then the equated credit hours are 1.5.

(3) A student is considered to be enrolled in a religious, seminarian, or theological academic program if, on or before the date as of which enrollment figures are computed, the student has become a declared major in religion or religious, seminarian, or theological studies, or has otherwise formally advised the institution in writing that the student is seeking a degree or certificate indicating the type of specialization that characterizes religious, seminarian, or theological academic programs.

(4) In deducting credit hours taken by students enrolled in religious, seminarian, or theological academic

programs, all credit hours of all of these students shall be deducted even if they are in subjects that do not relate directly to these programs.

D. Commission Form MHECIS S-6.

(1) An eligible institution shall fully complete Commission Form MHECIS S-6 and have it certified by an independent certified public accountant.

(2) The form may be revised from time to time by the Commission in a manner consistent with these regulations.

(3) The Commission shall furnish copies of this form to all known institutions by August 31 of each year.

(4) Institutions using the Semester system shall file the form with the Commission not later than October 15 of each year, and shall reflect the number of eligible semester credit hours as of a date on which that fall's enrollment has stabilized.

(5) An institution using the quarter system shall file the form not later than October 15 of each year, indicating the number of eligible quarter credit hours generated during the fall quarter and, not later than January 15 of each year, indicating the number of eligible quarter credit hours generated during the winter quarter.

E. Calculation of Full-Time Equivalent Students Enrolled. The Commission shall calculate the number of full-time equivalent students enrolled in an institution using the:

(1) Semester system by dividing the total number of eligible credit hours generated in that fall semester by 15; or

(2) Quarter system by dividing by 15 the sum of the fall eligible quarter credit hours multiplied by 0.69

and the winter eligible quarter credit hours multiplied by 0.31.

F. Annual Apportionment.

(1) The Commission shall multiply the number of full-time equivalent students enrolled in the institution by 16 percent of the State's general fund per full-time equivalent student appropriation to the 4-year public colleges and universities in Maryland for the preceding fiscal year. Upon approval and certification by the Commission, the resulting amount is the apportionment to the institution.

(2) The general fund per full-time equivalent student appropriation is based on the most recent prior year's appropriation as approved by the General Assembly or as revised by the Board of Public Works, and not the appropriation as subsequently reallocated by budget amendment.

.05 Administration of Program.

A. Verification and Notice.

(1) The Commission may verify the information submitted pursuant to Regulation .04 of this chapter as to eligible credit hours of enrollment by examining the registration or other data on which these submissions are based.

(2) If the figure resulting from the verification in § A(1) of this regulation differs from the figure submitted, the Commission shall certify to the State Comptroller an award amount based upon the corrected figure.

(3) Representatives of the institutions shall be given notice of the correction and an opportunity to discuss the basis for the correction with the Commission before the revision of the award.

B. Applications for Aid.

(1) Applications for aid shall be completed and filed not later than September 15 of the fiscal year for which aid is sought.

(2) Applications shall consist of a a preexpenditure affidavit and a statement-of-intended-use report.

(3) The Commission shall distribute copies of all forms constituting an application to all known eligible institutions by June 30 of each year.

C. Preexpenditure Affidavit.

(1) The preexpenditure affidavit shall be in a form as prescribed by the Commission.

(2) The chief executive officer of the institution shall execute the preexpenditure affidavit.

(3) The chief executive officer shall certify under oath or affirmation that funds received from the State may not be used for sectarian purposes, and that the institution has adopted and shall maintain and follow the accounting procedures described in § G of this regulation until all State funds applied for have been expended and accounted for to the Commission.

D. Statement-of-Intended-Use Report.

(1) The statement-of-intended-use report shall:

(a) Be in a form required by the Commission;

(b) Be executed by the chief executive officer or the chief financial officer of the institution; and

(c) Describe and itemize in sufficient detail the purposes for which State funds will be expended during the fiscal year for which the application is filed.

(2) If an institution later decides to use the funds for other purposes, the institution shall give the Commission prior written notice specifying the new purposes.

E. Certification and Payment of Awards.

(1) Following the receipt of timely and complete applications, and based upon its determination under Regulation .04 of this chapter, the Commission shall certify proposed awards to the State Comptroller not later than October 30.

(2) The State Comptroller's office shall make the awards by check to the institutions in two equal payments.

(3) The Commission shall forward promptly its certification of awards and request for the first payments to the Comptroller following formal approval by the Commission of awards.

(4) The Commission shall make the certification and request for the second payment not later than March 30.

F. The Commission may not pay an award to an eligible institution if the Commission has determined that the institution has failed to submit an adequate utilization-of-funds report in compliance with these regulations for any prior fiscal year.

G. Accounting Procedures.

(1) Eligible institutions shall follow the accounting procedures set forth in § G(2) of this regulation in connection with their receipt, expenditure, and accounting of State funds pursuant to these regulations.

(2) Procedures.

(a) An institution shall prepare its annual financial statements according to generally accepted accounting

principles for auditing and reporting on financial statements of nonprofit institutions of higher education, including colleges, universities, and community or junior colleges.

(b) The budget for each institution receiving State funds shall identify the specific areas of activity for which the institution will expend grant funds.

(c) State funds, when received by an institution, shall be placed in a special revenue account.

(d) Each budgeted segment reflected in the accounts of an institution shall have an expense account number for recording the expenditure of State funds.

(e) Each institution shall retain sufficient documentation of the State funds expended to permit verification by the Commission that no funds were spent for sectarian purposes for a period of 1 year following submission of a utilization-of-funds report in accordance with § I of this regulation.

(f) If the Commission determines that a verification or audit of an institution is necessary or appropriate in connection with the institution's expenditure of State funds, the institution shall:

(i) Cooperate fully with the persons designated by the Commission; and

(ii) Supply all information reasonably necessary to facilitate the fastest possible completion of the verification or audit.

H. End of Fiscal Year Reports.

(1) By the end of each fiscal year, the Commission shall send a utilization-of-funds report and a post-expendi-

ture affidavit to all eligible institutions receiving funds for that year.

(2) An institution receiving funds shall complete and file the utilization-of-funds report and post-expenditure affidavit before the Commission may act upon any application for aid from that institution for a subsequent fiscal year.

I. Utilization-of-Funds Report.

(1) The utilization-of-funds report and the post-expenditure affidavit shall be in the form prescribed by the Commission.

(2) The chief executive officer or chief financial officer of the institution shall certify the utilization-of-funds report.

(3) The institution shall describe and itemize in the utilization-of-funds report the purposes for which State funds have been expended during the fiscal year in sufficient detail to permit a prompt determination of whether any expenditure has been used for sectarian purposes.

J. Post-Expenditure Affidavit. The chief executive officer of an institution shall:

(1) Execute the post-expenditure affidavit under oath or affirmation; and

(2) Certify that none of the monies covered in the utilization-of-funds report have been used for sectarian purposes.

K. Whenever an institution reports that it has expended any State funds for capital construction or permanent improvements, it shall report periodically, on forms and at intervals specified by the Commission, on the use being made of the building or facility in question and certify

under oath or affirmation, given by its chief executive officer, that the building or facility is not being used for religious instruction or worship for any religious activity or sectarian purpose.

L. Unexpended Funds.

(1) An institution shall fully expend and report upon any funds that it did not expend by the end of the fiscal year in which the funds were paid, in the next fiscal year.

(2) In addition to the requirements of § L(1) of this regulation, the institution shall submit a new statement-of-intended-use report and a new preexpenditure affidavit by October 31.

M. Verification of Expenditures.

(1) The Commission may verify or have audited an institution's expenditure of State funds, with respect to any report required by these regulations, to determine whether funds awarded to the institution have been expended as authorized by these regulations.

(2) Before conducting a verification or audit requiring a physical examination of an institution's books or records, the Commission shall make reasonable efforts to satisfy its concern on the basis of data submitted by the institution.

(3) A verification or audit shall be conducted with the greatest possible speed and the least possible disruption of an institution's activities.

.06 Prohibition of Sectarian Use of Funds.

A. Education Article § 17-107, Annotated Code of Maryland, prohibits recipient institutions from using State funds for sectarian purposes. That provision generally prohibits the use of State funds to support religious in-

struction, religious worship, or other activities of a religious nature.

B. Prohibited Uses.

(1) Listed in § B(2) of this regulation are several potential uses of State funds that would violate the sectarian use prohibition. The list is not intended to be all inclusive and, if an institution is in doubt whether any other possible use of the funds might violate the sectarian use prohibition, it may consult with and seek the advice of the Commission in advance.

(2) An institution may not use State funds for:

(a) Student aid if the:

(i) Institution imposes religious restrictions or qualifications on eligibility for student aid, or

(ii) Students are enrolled in a religious, seminary, or theological academic program;

(b) The salary, in whole or in part, of an individual who:

(i) Is engaged in the teaching of religion or theology,

(ii) Serves as chaplain or director of the campus ministry, or

(iii) Administers or supervises a program of religious activities;

(c) The portion of the cost of maintenance or repair of a building or facility used for:

(i) The teaching of religion or theology,

(ii) Religious worship, or

(iii) A religious activity;

(d) Utility bills, if the institution has a building or facility that is used in whole or in part for the teaching of religion or theology, religious worship, or religious activity, unless the building is separately metered;

(e) Utility bills for a separately metered building or facility that is used in whole or in part for the teaching of religion or theology, religious worship, or religious activity; or

(f) The construction or renovation of a building or facility that is or will be used for the teaching of religion or theology, religious worship, or religious activity.

C. The Commission shall require an institution that violates the prohibition against sectarian usage set forth in this regulation to repay to the State all monies expended in violation of this prohibition. The institution is ineligible to receive further State aid until it has repaid these funds. If the Commission determines that an institution has violated the prohibition and that the responsible officers knew or reasonably should have known that it was doing so, then the Commission shall notify the institution, and the Commission may declare the institution ineligible to receive further State aid either for a specified number of years or permanently, and so notify the institution. The institution shall be given notice and an opportunity for a hearing before the Commission under the Administrative Procedure Act, State Government Article, §§ 10-201—10-227, Annotated Code of Maryland, before any declaration of ineligibility.

.07 Review by Board of Public Works.

These criteria and procedures are subject to the review of the Board of Public Works.

APPENDIX G

APPLICATION OF COLUMBIA UNION COLLEGE TO PARTICIPATE IN THE JOSEPH A. SELLINGER PROGRAM OF STATE AID TO NON-PUBLIC INSTITUTIONS OF HIGHER EDUCATION

MARYLAND HIGHER EDUCATION COMMISSION

DECEMBER 9, 1996

BACKGROUND

Maryland's State Air Program

The State's formal program of annual operating grants to nonpublic institutions of higher education began in 1971. The program is currently found in Section 17-101, et seq. of the Education Article. It is now known as the Joseph Sellinger Program. Shortly after the enactment of the program, the American Civil Liberties Union of Maryland, the Protestants and Other Americans United for Separation of Church and State, and four individual Maryland taxpayers challenged the aid that was proposed to be distributed in 1972 to five church-affiliated institutions: (1) The College of Notre Dame; (2) Mount St. Mary's College; (3) St. Joseph College; (4) Loyola College; and (5) Western Maryland College.¹ The aid program to those schools was upheld by the United States District Court for the District of Maryland, *Roemer v. Board of Public Works*, 387 F.Supp. 1282 (1974), and that judgment was affirmed by the Supreme Court. *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 96 S.Ct. 2337 (1976).

Columbia Union College

Columbia Union College (CUC), a private four-year college affiliated with the Seventh-day Adventist Church, has submitted an application to the Commission for state aid under the Joseph Sellinger Program. Columbia Union College also applied four years ago for permission from the Commission to participate in the program. In 1992, the Secretary, on behalf of the Commission and on advice of the Attorney General's office, denied Columbia Union's

¹ Of the five initial defendants in *Roemer*, one, St. Joseph College, became defunct after suit was filed, and another one, Western Maryland College, was dismissed as a defendant.

application on the basis that the College is a pervasively sectarian institution. The question now before the Commission is whether Columbia Union College remains a pervasively sectarian institution.

Process of Evaluation

The objective of the following discussion is to review the facts as they exist today and compare these facts with those in existence in 1992 with regard to the criteria used to determine whether or not Columbia Union continues to be a pervasively sectarian institution. Another objective of the evaluation is to determine whether there has been any substantial change in the nature of the three religious institutions currently receiving State grants under the program. The discussion uses the March 24, 1992, letter of advice from Assistant Attorney General William F. Howard to George J. Funaro, Deputy Secretary of Higher Education, as a model. Therefore, the structure of the following analysis is similar to that contained in that letter of advice.

All of the information on which the Commission staff's recommendation is based on this matter comes from written material supplied by Columbia Union, the College of Notre Dame, Mount Saint Mary's College, and Loyola College, as well as several discussions with representatives of these colleges. As was the case in 1992, the Commission staff was not able to and did not wish to create further possible legal problems by physically auditing courses, interviewing students and faculty members, or conducting any other type of on-campus subjective assessments of the amount of religion actually practiced by a particular college.

As was also the case in 1992, the Commission staff analysis and discussion focuses on deciding whether Columbia Union College is impermissibly more religious

than the three Catholic colleges examined in *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 96 S.Ct. 2337 (1976).

ANALYSIS

In General

The Supreme Court stated in the *Roemer* case that:

"To answer the question whether an institution is so 'pervasively sectarian' that it may receive no direct State aid of any kind, it is necessary to paint a general picture of the institution, composed of many elements." *Roemer*, 96 S.Ct. at 2340.

For Columbia Union College, the "general picture of the institution" is different from the three Catholic institutions previously examined by the Supreme Court in *Roemer* (the College of Notre Dame, Mount St. Mary's College, and Loyola College) and in the 1992 advice of counsel letter. A number of factors as set forth in *Roemer* have been examined. However, the five most important distinguishing features with respect to CUC are: (1) the lack of institutional autonomy; (2) the pervasiveness of religious influences in the institutional mission, general education and academic programs; (3) the requirement of religious worship for students; (4) its processes for faculty hiring, evaluation and conduct; and (5) its student admissions preference.

1. *Institutional Autonomy.*

The *Roemer* Court's summary of the findings on this point are as follows.:

"Despite their formal affiliation with the Roman Catholic Church, the colleges are 'characterized by a high degree of institutional autonomy.' None of the four receives funds from, or makes reports to,

the Catholic Church. The Church is represented on their governing boards but, as with Mount Saint Mary's, 'no instance of entry of Church considerations into college decisions was shown.'" *Roemer*, 96 S.Ct. 2349 (citations omitted).

Columbia Union College appears to have substantially more formal ties to the church and less institutional autonomy than the Court in *Roemer* found to be the case for the three Catholic institutions. To begin, its *Bulletin* states explicitly, under the heading "Affiliation," that CUC operates under the auspices of the Seventh-day Adventist Church. (1996-97 *Bulletin*, p. 10). Its formal governance structure, mission, and financial arrangements all support this conclusion.

The official or formal ties between the Seventh-day Adventist Church and CUC are reinforced and implemented by substantial annual operating grants from the Church to CUC. For the year ended June 30, 1996, CUC received 21.4% of its unrestricted education and general revenue, or approximately \$2.5 million, as a "Church subsidy." (Independent Auditor's Report and Financial Statement, 1996, p. 3). The proportion and amount were approximately the same for previous years. As indicated above, the three institutions examined in *Roemer* did not, and do not presently receive any funds from or make reports to the Catholic Church, so CUC's finances are substantially different from, and the institution considerably less autonomous than, those entities.

The Board of Trustees guides the overall mission and direction of all four of the colleges, overseeing management and setting major policies. However, in contrast to the three Catholic colleges, according to the CUC's Bylaws:

"The trustees shall continually evaluate the needs of individuals with a Seventh-day Adventist Church

background, the general public who reside in Maryland and adjacent communities, educationally, occupationally, morally, spiritually, and socially so as to guide the college wisely in fulfilling its mission in higher education." (Bylaws, Article V, Section A, p. 7).

Moreover, in constituting the Board of Trustees, the Bylaws state: "The board of trustees shall have a voting membership of thirty-eight (38), at least thirty-four (34) of whom shall be members of the Seventh-day Adventist Church." (Bylaws, Article V, Section B, p. 10).

With respect to governance, its Bylaws state that the constituency of the corporation consists of the executive committees of the Columbia Union Conference of Seventh-day Adventists, and several church officers from the General Conference of Seventh-day Adventists, as well as the Board of Trustees, administrative officers, and certain faculty members of CUC. (Bylaws, Article III, Section A, pp. 1-2). The revised Articles of Incorporation for CUC that were approved in July 1996 continue to require that all members of the constituency be "Seventh-day Adventists Members" as defined in the Bylaws. (Article of Incorporation, Article VII, p. 6). At least two-thirds of these members shall be composed of members from specific denominational constituencies, boards or executive committees of organizations that are listed in the Seventh-day Adventists Year Book. (Articles of Incorporation, Article VII, p. 6). The Bylaws further provide that the chair and vice chair of the Board of Trustees of CUC shall be respectively the president and secretary of the Columbia Union Conference of Seventh-day Adventists. (Bylaws, Article V, Section C. 1. & 2., p. 12) In addition, Article IV of the Bylaws explicitly requires that "all corporate and administrative officers, shall be members in

good standing of the Seventh-day Adventist Church." (Bylaws, Article IV, Section A., p. 4).

The Board of Trustees is substantially more church related than the Boards at the other three institutions. The percentage of church related Board members is mandated at a significantly higher value (34 of 38 or 89%) than the other three institutions which ranged from mandated percentages of 0 to 25%. The Board of CUC is considerably less autonomous in its religious association to the institution's church affiliate.

The governing structures of the three Catholic colleges are quite different and remain essentially the same as they were in 1974 and 1992. None of the Catholic colleges receives formal funding from the Catholic Church nor is there an established reporting mechanism or reporting requirement to the Catholic Church.

Loyola College is a Catholic comprehensive university under the aegis of the Society of Jesus, in collaboration with the Sisters of Mercy; however, Loyola College retains strong institutional autonomy from the Catholic Church. The College is overseen and managed by an independent Board of Trustees. Board members are elected by a majority of voting Board members at the annual meeting of the Board (Bylaws, Article I, Sections 2 and 4). The Board consists of no fewer than three and no more than 30 members (Bylaws, Article I, Section 2). The Nomination Committee of the Board puts forward candidates for election and is directed to keep in mind the College's commitment to maintain a suitable proportion of Jesuit representation on the Board. No mandatory proportion of Church affiliated members is specified for the Board (Bylaws, Article V, Sections 6 and 6.5). Current Board membership includes four members of the Society of Jesus and two members of the Sisters of Mercy,

accounting for six of the 30 Board members (or 20%). Board officers, except for the president of the College, are elected from the Board members without regard to religious affiliation. The President of the College must be a member of the Society of Jesus, provided that a qualified candidate can be found (Bylaws, Article II, Section 2). Except for the President, executive officers of the College are elected by the Board without regard to their religious affiliation (Bylaws, Article II, Sections 1 and 2).

The College of Notre Dame was founded by the School Sisters of Notre Dame. Its Board of Trustees, comprised of a minimum of 19 but no more than 30 members, is the source of governance and direction of the College. The composition of the Board of Trustees stems from a cross-section of individuals, only one fourth of whom must be members of the Congregation of the School Sisters of Notre Dame (Bylaws, Articles IV, Section 1). A five member corporation oversees the Board (Bylaws, Article II, Sections 1, 2 and 3).

Mount Saint Mary's College and Seminary, which characterizes itself as America's oldest independent Catholic college, has a self-perpetuating Board of Trustees consisting of no fewer than 24 and no more than 33 members (Bylaws, Article II, Sections 2 and 4). Board members are elected by a majority of voting Board members (Bylaws, Article II, Section 4). At least one fourth of the members, including the Archbishop of Baltimore, must be priests (Bylaws, Article II, Section 2). There is no requirement that an officer of the Trustees or of the college be a member of the Catholic Church, except for the Rector of the Seminary and the Chancellor of the Seminary, both of whom are designated as vice presidents (Bylaws, Article VI and Sections 5 and 6).

2. *Institutional Mission.*

In addition to the religious aspects of CUC's governing structure, the purposes of the corporation indicate a religious mission. Its 1966 Articles of Incorporation state that one of CUC's purposes is to "give instruction and to provide special training for youth leading to the development of Christian character and the preparation for service, both public and private, in the Seventh-day Adventist denomination, in carrying forward its world-wide program of evangelism, health, religious education, publishing, and home and foreign mission endeavors." That specific language was eliminated in the 1991 revision of the Articles of Incorporation, but the more streamlined purpose clause still states in the 1996 amended Articles of Incorporation that CUC is "an integral part of the system of educational institutions established and operated under the auspices of the Seventh-day Adventist Church as carried out through its sponsoring organization, the Columbia Union Conference of Seventh-day Adventists." (Articles of Incorporation, Article IV.B, p. 2) Moreover, Article XII of the revised Articles of Incorporation provides that if the Church exists as a corporate entity at the time of dissolution of CUC, then the assets of CUC shall be disposed of by gift to the Church. (Articles of Incorporation, Article XII, p. 7)

The mission statement of Columbia Union College states that it is "a Seventh-day Adventist institution." (1996-97 Bulletin, p. 11). That statement or fact by itself poses no constitutional problem, because the institutions challenged in *Roemer* were, and continue to be, described by themselves or others as Roman Catholic institutions of higher education. Mere affiliation or public identification does not create a pervasively sectarian institution. However, CUC's central mission and objectives emphasize the in-

tegrated nature of all of its educational components in serving the religious purposes of the Church. For example, the 1996-97 Bulletin at page 11 states that "the heart of Columbian Union College is a Christocentric vision that affirms the goodness of life, the value of earth, and the dignity of all peoples and cultures."

Upon graduation CUC students must demonstrate a competency in "Spiritual Identity" which requires that the students "understand the basic spirituality that is the heart of the college's Mission and Statement of Community Ethos". (1996-97 Bulletin, p. 11). The Statement of Community Ethos establishes the attitudes and beliefs for students and faculty of Columbia Union College. Within that Statement, the following ideals are expressed. With regard to "Faith" it is stated: "We value faith in God, and celebrate the goodness of creation, the dignity of diverse peoples and possibility of human transformation. Through worship and shared life, we uphold spiritual integrity and help one another achieve it." And, with respect to "Growth" the statement includes the following: "We acknowledge our need and capacity, under God, for continuous growth toward the realization of these ideals." (1996-97 Bulletin, p. 314).

Coupled with its governance structure and mission, as well as its finances, the conclusion is that CUC is in fact exactly what it purports to be: a Church-run college. It is fundamentally different with less autonomy from the Church than the other three institutions. While the three Catholic colleges all acknowledge their affiliation with the Catholic religion, their missions are dedicated to liberal education and not to the indoctrination of the Catholic faith.

3. *Religious Worship.*

The *Roemer* courts characterized the institutions under review there as not having pervasive or substantial religious exercises or indoctrination on campus:

"The colleges employ Roman Catholic Chaplains and hold Roman Catholic religious exercises on campus. Attendance at such is not required; encouragement of spiritual development is only 'one secondary objective' of each college; and 'at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience.' It was the District Court's general finding that 'religious indoctrination is not a substantial purpose or activity of any of these defendants.'" *Roemer*, 96 S.Ct. at 2349 (citations omitted).

The same description of the three Catholic colleges applies today. None of the Catholic colleges require attendance at religious services. A liberal arts education is the primary objective of all three institutions. None have as a substantial purpose or activity the religious indoctrination of the students. And, while there is a chapel and a chaplain on each of the campuses, all three provide accommodations for people of other faiths. (Loyola College 1996-97 Undergraduate Catalogue, p. 63, and Handbook, p. 114; Mount Saint Mary's College 1996-97 Catalogue, pp. 6, 18, and 173, and Prospectus, p. 14; College of Notre Dame 1996-98 Undergraduate Catalogue, p. 44, Student Handbook, p. 15).

On the other hand, based on CUC's corporate purposes and mission statement as discussed above, it would be difficult to conclude that encouragement of spiritual development at CUC is only a secondary objective or that religious indoctrination is not a substantial purpose or activity at CUC. Beyond those documents, however, much more

evidence exists that religious development is indeed a very important part of an education at CUC.

"A college church is located on campus, and students have access to many Seventh-day Adventist churches within the metropolitan area. A full-time chaplain coordinates religious activities and provides spiritual counseling.

"Worships for dormitory students and weekly chapel for the entire student body serve educational and religious purposes. They also provide an element of unity for the college family." (1996-97 Bulletin, p. 14).

Moreover, the following excerpts from the Student Handbook specify other religious behaviors incumbent on CUC students:

"Seventh-day Adventists have a special regard for Saturday, the Bible-based 'Sabbath.' The Bible designates the seventh day of the week as a day of rest and worship". . . .

"Special religious celebrations on the day of rest include Friday night programs, and Sabbath school and church services on Saturday mornings."

"Because there are no classes on Saturdays (the library is closed, college offices and athletic facilities are closed, as well) and because only vital work programs continue, students may worship, engage in Christian service, socialize, explore Washington, or simply rest."

"As a courtesy to Sabbath keeping students, faculty and staff who regard the day as holy, the college asks for restraint and discretion in the selection and volume of music played on the campus from sundown Friday until sundown Saturday. Other activities such as sporting events, parties, coursework preparation

and similar activities, are considered inappropriate to the spirit of the day." (1994-95 Student Handbook, p. 19).

All the above religious services and presence on and around the campus are greater than those found to exist at the colleges in *Roemer*. In addition to the above, CUC requires religious worship services in its residence halls. The residence hall worship policy describes that program as follows:

"Residents under the age of 23 (unless exempt) are expected to attend three of the six weekly worship options. Worships are held Monday through Thursday evenings at 7:00 PM in one or both residence halls. Doors close promptly, and attendance cards are not accepted after the doors close. Friday evening services are held at 7:30 PM in Sligo Church. College Church is held at 10:15 AM; the location varies. Proper attire is expected at all worships during Sabbath hours. . . .

"Failure to attend adequate worships in any given week (normally 3) will result in disciplinary action. . . . Following the third (3) skip the resident will be sent a warning letter. Following the sixth skip (6) the resident will be placed on a 14 day 10:00 PM curfew/leave restriction. A copy of this notice form will be sent to the parent. Following the ninth (9) skip the resident will be placed on a 21 day 9:00 PM curfew/leave restriction. A copy of this notice form will be sent to the parent. Following the tenth (10) skip the resident will be placed on a two day suspension from the college. Following the eleventh (11) skip the resident will be referred to the Conduct and Guidance Committee with a recommendation for expulsion from the college. (Residence Hall Resident Handbook, p. 15) (footnotes omitted).

The religious worship policy is reinforced by CUC's policy that "single students who are less than 23 years of age who are registered for six or more hours (or four or more during summer session) are required to live with their parents or in a campus residence hall." (1996-97 Student Handbook, p. 23). Thus, it is likely that the required religious services will apply to the vast majority of CUC students at any given time, and will apply to nearly all of its traditional students for the majority of their attendance at CUC, assuming that the most common period of attendance for traditional college students would be from 18 to 22 years of age.

In addition to the required daily attendance at religious worship services for residence hall students, traditional students are required to attend chapel every Wednesday from 11:15 AM to 12:15 PM in Sligo Church and Monday assemblies as scheduled on the college calendar. (1996-97 Student Handbook, p. 19). All students taking six hours or more must attend chapel and assembly. Those taking less than six hours are automatically excused. If a student increases his/her class load to six or more hours after registration day, he/she will be expected to begin attending chapel and assembly. If a student arrives after 11:25 AM he/she will not be counted present. Attendance is required, but a student is allowed four unexcused absences each semester. Six unexcused absences will result in a 48-hour suspension from the college. Eight unexcused absences will result in dismissal from the college. (1996-97 Student Handbook, p. 19).

The presence of religious service in the residence halls and the students' required attendance at services is significantly different from the situation at the colleges in *Roemer*. This is an important factor that contributes significantly to the conclusion that CUC is "pervasively sectarian".

4. Religion Courses.

A third factor examined by the *Roemer* courts was the requirement of a certain number of religion or theology courses as part of any degree program. Certain religion or theology courses were required at each of the *Roemer* institutions, and these courses were taught predominantly or wholly by clergy. The *Roemer* courts found this not to be a controlling factor in the overall characterization of the institutions, however, because these credits were a relatively small part of a general curriculum covering the spectrum of a liberal arts program. None of the *Roemer* institutions offered a religion or theology major, although each of them had a strong academic department in these areas.

These characterizations of the three Catholic colleges are still generally true. While there are no specific religious goals or purposes to the general education core required of all students, all three schools require two theology or religion courses in the context of the general education core requirements. At all three, these courses are taught as academic disciplines and are nondenominational in philosophy and content. Each college has a campus ministry which provides religious activities, but the campus ministries are separate and distinct from the academically focused theology or religious studies departments.

CUC's general education program, which includes the required religious studies courses, is also described as including sectarian purposes. "The general education component supplements the major." Two of its six stated goals are to "acquire knowledge of belief system, values and ethics" and to "integrate the principles of physical, mental, social, and spiritual health into the activities of daily living." (1996-97 Bulletin, pp. 56-57).

At Loyola College the theology course requirements accounts for 5% of the course work for a degree and 11% of the general education requirements (1996-97 Undergraduate Catalogue, Curriculum and Policies, p. 43). The academic courses required are TH201 (Introduction to Theology) and a second course elected by the student from TH202 through TH280. At Mount Saint Mary's College the theology course requirement accounts for 5% of the course work for a degree and 10% of the core curriculum credit requirements (1996-97 Catalogue, pp. 7 and 9). At the College of Notre Dame the religion courses account for 5% of the total credits needed to graduate and 12% of the general education requirements (1996-1998 Undergraduate Catalogue, p. 31).

However, unlike the situation in 1974, two of the three Catholic colleges offer a baccalaureate degree with a religion or theology major. At Loyola, the theology major is one of 34 majors and one of 27 possible minors (1996-97 Undergraduate Catalogue, pp. 45 and 206-216). At Mount Saint Mary's College, the theology major is one of 40 majors or possible minors (Prospectus, inside cover page). At the College of Notre Dame Religious Studies is offered as a minor or concentration only in its regular weekday program (1996-98 Undergraduate Catalogue, p. 144). At Loyola a master's degree and a doctorate degree are offered in the Department of Pastoral Counseling. The focus of these degrees are on obtaining counseling theory and practical skills and not religious indoctrination (1996-97 Graduate Catalogue, p. 84-96). At Mount Saint Mary's College two graduate degrees are offered through its separate Seminary (1996-97 Catalogue, p. 4).

The religious department at Columbia Union is quite different. Students at CUC are required to take 12 hours

of religion towards a bachelor degree or 6 hours of religion towards an associate degree. CUC does offer several religion majors, but this alone would not be a distinction of constitutional significance. However, CUC's own statements of its religion department's purposes and function provides a constitutionally significant difference and contribute to a general picture of the institution as pervasively sectarian. The 1996-97 Bulletin states as follows:

"The Religion Department, through its curriculum, field training, pastoral counseling, and religious activities, seeks to provide for the spiritual needs of every student on campus. It seeks to set a tone of spirituality appropriate for a Christian institution. It believes that in a Christian college Christian principles should characterize every phase of college life, whether it be intellectual, physical, social, or moral. Because of this comprehensive emphasis the department functions in a much broader area than that of most college departments. It is concerned with more than courses of study; it is dedicated to helping everyone prepare for unselfish service in this life and for the greater joy or service in the world to come. (1996-97 Bulletin, p. 211).

The 1996-97 Student Handbook also states:

"One of the premier ways in which Columbia Union College enriches the spiritual and personal lives of its students, faculty, and staff is through a weekly chapel service. Chapel is a time devoted to the nurture of the college community and to the further definition of its goals and priorities. The Chaplain's office facilitates this process by ensuring that chapel services reflect careful programming and adherence to a clear vision of worship.

"Members of the college community are expected to attend chapel because the college recognizes that attendance at this weekly time of devotion offers enormous benefits not only to the individual but to the entire community." (1996-97 Student Handbook, Chapel Mission Statement, p. 19).

5. *Religious Influences in Non-Theology Courses.*

In addition to assessing the relative importance of religion and theology courses at the challenged institutions, the *Roemer* courts examined several facets of non-theology courses before concluding that such courses were taught in an atmosphere of intellectual freedom and without religious pressures. For example, the Court observed that each Catholic college subscribed to the 1940 Statement of Principles on Academic Freedom the American Association of University Professors and that textbooks appeared to be selected at the discretion of the instructor and with respect to the academic requirements intrinsic to the subject matter. Although some non-theology classes were begun with prayer, some instructors wore clerical garb, and some religious symbols were present in the classrooms, the *Roemer* courts characterized these as aspects of the instructors' academic freedom. It viewed these facts as peripheral to the subject of religious permeation and not detracting from the evidence that each course was taught according to the academic requirements intrinsic to this subject matter and the individual teachers' concept of professional standards

Again, this description of the three Catholic colleges is true today. All three subscribe to the AAUP Statement of Principles on Academic Freedom (Loyola Faculty Handbook Section 4, A, p. 32; Mount Saint Mary's Col-

lege Faculty Handbook, p. 14;² College of Notre Dame Faculty Handbook, p. 45). With this statement of academic freedom in place, instructors and academic departments at all three are free to select textbooks which best represent their discipline of instruction. In the spirit of academic freedom all majors, including theology, are taught as academic disciplines without religious purpose or indoctrination. There is no policy at any of these schools regarding prayer or religious symbols in the classrooms. Instructors have a personal choice in wearing clerical garb.

CUC has its own statement of academic freedom, which is not the same as the AAUP statement. For example, its philosophy of academic freedom states that "[s]ince society permits and encourages certain groups such as religious organizations to found colleges that are intended to render services to a particular group, it is permissible and right for sponsors of such colleges to define appropriate limitations of instructional freedom." (Policy Handbook for Administration and Faculty, Appendix F, p. 1). This statement is adopted by CUC from the revised accrediting manual of the North Central Association of Colleges and Secondary Schools. CUC's academic freedom statement further provides:

"[S]ince this College is established and maintained by the Seventh-day Adventist Church, the following limitations are suggested to the faculty by virtue of their church affiliation: . . .

² While the Faculty Handbook of Mount Saint Mary's College does not currently explicitly reference the 1940 AAUP Statement, the Handbook does state that the College values the principles of academic freedom in the conduct of classroom teaching and research. To this end, the statement is compatible with the AAUP statement.

"B. In exercising their duties, faculty members should bear in mind their peculiar obligation as Christian scholars and members of a Seventh-day Adventist College.

"C. Faculty members are entitled to freedom in the classroom in discussing the areas of their specialties.

"D. As citizens, faculty members have certain responsibilities and privileges. In exercising these rights, they have complete freedom so long as their speech and actions are in harmony with the philosophies and principles of the college—a Seventh-day Adventist institution of higher education." (Policy Handbook for Administration and Faculty, Appendix F, pp. 1 and 2).

Although this statement may not restrict the "beliefs of the individual or the commitment to the discipline they represent," after an objective reading of this statement it would be hard to conclude that "non-theology courses are taught in an 'atmosphere of intellectual freedom' and without 'religious pressures' ". *Roemer*, 93 S.Ct. at 2349.

In addition to the religious references in CUC's statement on academic freedom, there are numerous references throughout CUC's Bulletin to religious objectives or influences in non-theology departments. Examples include the following departmental descriptions:

- Business (1996-97 Bulletin, p. 96): "The department's goal is to graduate students who combine a high degree of technical competence and preparedness to assume positions of interest and responsibility with an approach to people, work, and life that demonstrates outstanding Christian values and ethics."
- Communication (1996-97 Bulletin, p. 119): The programs are designed on the principle 'that the

ability to communicate adequately and effectively is of prime importance to each individual's personal development, social growth, Christian witness, and vocational success. . . ."

- Education (1996-97 Bulletin, p. 142): "The professional education sequence is planned to provide experiences . . . by which the beginning teacher: (1) understands human development; (2) recognizes the teacher's role in school, society, and the church; . . . and (5) is able to implement a Christian philosophy of education."
- Engineering (1996-97 Bulletin, p. 150) Recognizes the need ". . . to provide for the education and training of engineers within the environment of a Christian institution. . . ."
- Liberal Studies (1996-97 Bulletin, p. 176) Courses seek ". . . to address questions such as our response as caring Christians to the skills and arts of civilization."
- Music (1996-97 Bulletin, p. 188) "It is the aim of the faculty to present music as a medium for spiritual, emotional, and cultural development."
- Nursing (1996-97 Bulletin, p. 196) The Department of Nursing ". . . is committed to providing quality baccalaureate Christian nursing education . . ."
- Psychology (1996-97 Bulletin, p. 207): A further objective is ". . . to assist the student in mental and spiritual development through the application of these principles and to enable the student to evaluate emotional and spiritual phenomena through an understanding of Christian principles of mental health."

All of these are further indications that non-theology courses of CUC are infused with some religious influence, and that they are not simply taught according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards as they might be at any other general liberal arts college and are taught at the Catholic institutions in particular.

6. *Process for Faculty Hiring, Evaluation and Conduct.*

The *Roemer* courts reached the conclusion that each challenged institution could receive State aid by relying in part on the fact that faculty hiring decisions were not made on a religious basis. The District Court in that case found that academic quality was the principal hiring criterion. Two of those institutions made no inquiry at all into a faculty applicant's religion, and for all of them budgetary considerations which might lead the colleges generally to favor members of religious orders (who are often paid less than the comparable lay salary) had not predominated to such an extent that resulted in a stacking or an imbalance of the faculty in favor of clergy or faculty of a certain religion. *Roemer*, 93 S.Ct. at 2350.

Today, none of the three Catholic colleges gives any preference in faculty hiring to members of the Catholic faith. The principle hiring criterion is competency in an academic field. At Mount Saint Mary's College the Bylaws of the college specifically prohibit any discrimination in hiring on the basis of religion (Bylaws, Article IX). At Loyola College the nondiscriminatory practices contained in the Faculty Handbook prohibits discrimination on the basis of religion with regard to students, faculty, administrators, and staff. However, at Loyola, if a potential faculty member is a Jesuit, the Jesuit Community is notified and included in the interview process (Faculty handbook Section III, A). At the College of Notre Dame,

while attracting School Sisters of Notre Dame to the College faculty is a goal, competence in the field is the primary basis for hiring faculty (1996 Faculty Handbook, p. 29)

Faculty statistics for CUC were not provided. However, in 1992 the college stated that out of 150 full time faculty and support staff, only 16 are non-Adventists. In addition, the standard Faculty Appointment Agreement states that "the employee expressly agrees to abide by the mission of Columbia Union College which supports the mission of the Seventh-day Adventist Church". Although it does not expressly require church membership, this stipulation comes quite close to that and clearly indicates a preference for Seventh-day Adventists.

Further, Columbia Union has an approved "Code of Ethics for Teachers." Within the Code is a statement of philosophy to the effect that the college "... believes that the highest development of the individual takes place within the moral and ethical code implied in the life and teachings of Jesus Christ as recorded in the Scriptures and that the search for truth is most fruitful within a philosophical framework based on the Bible; therefore, the college expects its teachers to conduct themselves in harmony with this moral and ethical code and encourages them to find in this philosophical framework both inspirational and guidance in the search for truth in every discipline." To this end, faculty are expected to be "actively concerned for the general and spiritual welfare of students and assist students in learning God's purpose for their lives." (Policy Handbook for Administration and Faculty, Appendix H, p. 1).

Moreover, the "Criteria for Determining Faculty Excellence" at the College states that the faculty "encourages discussion and evaluation of the spiritual, moral and ethical implications of the subject matter" . . . and "shows

willingness to counsel privately with students regarding scholastic, spiritual and personal problems." Further, the faculty "endorses the college program of Christian education;" . . . "represents the college at religious and/or academic meetings; [and] . . . participates in church and community affairs." (Policy Handbook for Administration and Faculty, Appendix I, p. 1).

Finally, the College asks students to evaluate instructors' performance by stating whether or not Christian values and philosophy were emphasized and exhibited by the teacher in class lectures and discussions. (Policy Handbook for Administration and Faculty, Appendix I, Student Evaluation of An Instructor Form). The religious considerations in the processes for hiring, evaluating and maintaining faculty at CUC distinguishes it in a significant way from the three Catholic colleges.

7. Student Body.

In *Roemer*, "the great majority of students at each of the colleges [were] Roman Catholic, but the District Court concluded from a 'thorough analysis of the student admission and recruiting criteria' that the student bodies 'are chosen without regard to religion.'" *Roemer*, 93 S.Ct. at 2350.

Specific enrollment information on CUC students by religious affiliation was not provided. However, its admission application for the traditional program contains a category or detailed specification of religious affiliation. Its application for the adult evening program contains a blank for the student to fill in his or her religious affiliation, but apparently this information has not been tabulated. CUC's non-discrimination policy states that "the College is committed to equal educational and employment opportunities for men and women and does not discriminate on

the basis of race, sex or age among its students or among applicants for admission. CUC welcomes applications from students whose principles and interests are in harmony with the policies and principles as expressed in this Bulletin." (1996-97 Bulletin, p. 15).

Even without precise information on the religious affiliation of the student body, there are other indications from CUC's policies and recruitment practices that its traditional student body is intended to be composed almost exclusively of Seventh-day Adventists. For example, the human rights policy in the Student Handbook states that Columbia Union College "expects students and employees to uphold biblical principles of morality and deportment as interpreted by the Seventh-day Adventist Church." (1996-97 Student Handbook, p. 12). Furthermore, according to the CUC Student Handbook and College Bulletin:

"The College reserves constitutional and statutory rights as a religious institution and employer to give preference to Seventh-day Adventists in admissions and employment . . ." (1996-97 Student Handbook, p. 12).

"Since admission to CUC is a privilege, not a right, students must choose before enrolling whether they wish to accept the principles and standards of the college. By enrolling at CUC, students indicate their commitment to honor and abide by the college policies and regulations as long as they are students of the college." (1996-97 Bulletin, pp. 12-13)

As noted above, some of these policies and regulations include required daily and other occasional attendance at religious worship services. The CUC Student Handbook describes student life and services in detail and sets forth the policies and standards of conduct students are ex-

pected to honor. (1996-97 Student Handbook, p. 12). In addition, the Bulletin contains the following statement:

"... CUC aims to develop the talent of its students, and to instill in them the value of service and the love of truth and learning. The intended outcome of a CUC education is graduates who 'bring competence and moral leadership to their communities'.

"An environment hospitable to these goals requires students at the college to embrace certain moral standards and abide by certain rules of conduct." (1996-97 Bulletin, p. 12)

The Student Handbook goes on to state that students are expected to embrace the following:

"We value faith in God, and celebrate the goodness of creation, the dignity of diverse peoples and the possibility of human transformation. Through worship and shared life, we uphold spiritual integrity and help one another to achieve it. . . ." (1996-97 Student Handbook, p. 4.)

"All students must dress and groom themselves modestly and appropriately. CUC has long embraced the Bible-based 'plain tradition' in regards to personal appearance. With respect to ornamental jewelry, students are requested to honor the principles of discretion and simplicity." (1996-97 Student Handbook, p. 8.)

Furthermore, CUC's code of conduct describes the following prohibited conduct:

"In keeping with college standards and Biblical ethics, students must not: . . . (11) participate in entertainment or activities, which are in conflict with college standards; (12) be consistently absent from

class or chapel; . . ." (1996-97 Student Handbook, p. 7).

"In addition, students who live in campus residence halls must not: . . . (22) display posters, pictures, or objects in residence hall rooms which are in conflict with Biblical principles; . . . (24) violate the residence hall worship policy; . . ." (1996-97 Student Handbook, p. 8).

In contrast, the three Catholic colleges admit students without regard to their particular faith or beliefs. Rather, the students are primarily chosen for their academic preparation and promise. The admission decision is based mainly on the result of an academic review. Students at all three colleges are welcome from all religious backgrounds. There is no policy mandating preference or quotas for students of a particular religious affiliation. Students are not required to reveal their church affiliation. There is no dress code for students. The student codes of conduct are not infused with religious-related requirements or prohibitions. No religious affiliation is required for participation in any student organization or to hold office in a student organization.

CONCLUSION

The Office of the Attorney General has advised that the legal test for determining whether or not the State may constitutionally provide funds to a private religious college remains the same today as it was in 1992. Within that constitutional context and based on the information submitted by Columbia Union College, the Commission staff concluded that Columbia Union College remains a pervasively sectarian institution. This staff conclusion was based on its analysis of multiple materials, official documents, and publications cited in this report.

The staff determined that CUC continued to lack essential institutional autonomy as evidenced, among other indices, by its funding relationship to the Seventh-day Adventist Church and the preponderance of Church membership required of its governing board. These findings were in marked contrast to the three Catholic institutions which had no Church related funding and which required significantly less religious membership for their governing boards. While all four institutions acknowledged their affiliation with a religious body, evidence of an expressed religious philosophy, influence, and indoctrination in institutional mission, general education, and academic programs was found at CUC in contradistinction to the other institutions examined.

CUC maintains extensive religious worship requirements for students which were not evident at the *Roemer* Catholic institutions. Commission staff noted the pervasive nature of religious considerations in faculty hiring, instructional evaluation, and the code of conduct at CUC which were not similar in nature to the commitment of the Catholic institutions to the 1940 AAUP guidelines on academic freedom. Finally, the staff noted that CUC gave admission preference to students of the Seventh-day Adventist Church and placed limitations on student conduct and behavior which would not be consistent with the teachings of the Seventh-day Adventist Church. The three Catholic institutions gave no preferential admission to students of the Catholic faith and did not place Church related conduct restrictions upon students. Accordingly, the staff analysis concludes that the pervasively sectarian nature of Columbia Union College continues to exist today. Therefore, the Commission staff recommends that the Maryland Higher Education Commission deny the application of Columbia Union College to participate in the Joseph Sellinger Program and receive State funding.

Finally, based upon the information submitted by Loyola College in Maryland, Mount Saint Mary's College and the College of Notre Dame of Maryland, the Commission staff determined that no material or substantive change in the operational or conceptual nature of these institutions had occurred since the 1976 Supreme Court decision that these colleges were eligible for participation in the Joseph Sellinger Program.

MAY 5 1999

OFFICE OF THE CLERK

No. 98-1509

In the

Supreme Court of the United States

OCTOBER TERM, 1998

COLUMBIA UNION COLLEGE,

Petitioner,

v.

EDWARD O. CLARKE, JR., et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Is a remand order requiring the development of a complete factual record before deciding whether Columbia Union College is pervasively sectarian ripe for review or tantamount to excessive entanglement?

2. Should this Court depart from longstanding precedent barring direct State aid to the core educational programs of a pervasively sectarian institution in the absence of a factual record?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners seek review of a decision of the United States Court of Appeals for the Fourth Circuit vacating and remanding a grant of summary judgment in favor of the members of the Maryland Higher Education Commission. The panel majority determined that the district court erred in resting its conclusion that Columbia Union College is "pervasively sectarian" on an incomplete record and in considering the facts in the light least, rather than most, favorable to Columbia Union. Appendix to Petition for Writ of Certiorari (hereafter "App." __) at 33. At the same time, the court of appeals applied longstanding Establishment Clause decisions, including the recent case of

Agostini v. Felton, 117 S. Ct. 1997 (1997), that bar a direct transfer of State funds to a pervasively sectarian institution to fund its core educational functions. (App. 21.) The petition seeks to reverse this settled doctrine notwithstanding the lack of a factual record for review.

1. Proceedings Below.

In June 1996 the College filed this lawsuit challenging the Commission's refusal to reconsider its Secretary's denial in 1992 of the College's request for direct State aid under the Joseph Sellinger program. The Sellinger program, a grant program established in 1971 by the Maryland General Assembly, provides aid to qualifying non-public institutions of higher education, including three colleges that have some religious affiliation. See Md. Educ. Code Ann. §§ 17-101 *et seq.*

Although Columbia Union had not then filed a current application for State funds, it claimed an immediate injury because the Commission's counsel advised it on January 20, 1996, that the then-recent decision in *Rosenberger v. Rector and Bd. of Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), did not change the law prohibiting such aid. After the Commission moved to dismiss on ripeness grounds, the district judge obtained a stipulation that Columbia Union would apply for funds and that the Commission would consider its application on an expedited basis. The Commission developed a factual record and determined that the College was a pervasively sectarian institution not entitled to State funds.

On December 24, 1996, Columbia Union filed an Amended Complaint against Edward O. Clarke, Jr., the Commission's Chairman, and other Commission members in their official capacities (collectively "the Commission"). The parties filed cross-motions for summary judgment and the court granted summary judgment in favor of the defendants. On appeal the Fourth Circuit vacated and remanded the district court's order. The College filed its Petition for a Writ of Certiorari following denial of its

Petition for Rehearing and Suggestion for Rehearing en Banc.

2. The Statutory Scheme.

The Commission administers the Sellinger program by, among other things, determining which institutions are eligible for aid, *id.* §17-103; computing the aid to which an institution is entitled, *id.*, §17-104; certifying to the Governor for inclusion in the annual budget the amount due to an eligible institution, *id.*, §17-105; and assuring that an institution not use money for a sectarian purpose, *id.*, §17-107. The statutory scheme provides for direct aid to institutions and contains no authority for the Commission to make payments to a student attending an eligible institution.

In *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976) (plurality opinion), this Court rejected a taxpayer challenge on Establishment grounds to the constitutionality of the statute and the disbursements of funds to four religiously affiliated institutions, three of which still receive Sellinger funds today. Although the colleges unquestionably were affiliated with a church, they were not, Justice Blackmun held, "pervasively sectarian," so that direct State aid to them did not violate the Establishment Clause. *Id.* at 758-59.

3. Decisions Below.

Columbia Union's applications for Sellinger funds were the first (and only) such requests by a religious institution since *Roemer*. Based on the funding formula under the grant program, the College sought \$806,079 in state funds for core educational programs, including its mathematics, computer science, clinical laboratory science, respiratory care and nursing programs. The Commission report denying Sellinger aid to Columbia Union concluded that it is a pervasively sectarian institution under *Roemer* because, among other things, it receives over one-fifth of its revenue from the Seventh-day Adventist Church; its Bylaws require that 34 out of its 38 governing board be Church members;

and its policies require its resident students to attend three of six weekly worship services. (App. 107, 109, 115.)

In granting summary judgment to the Commission, the district court cited these facts and concluded that Columbia Union may not receive direct State aid because of the risk that, "even if designated for specific secular purposes, [such aid] may nonetheless advance the pervasively sectarian institution's religious mission." (App. 60, citing *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988).) Applying *Roemer*, *Bowen*, and *Hunt v. McNair*, 413 U.S. 734 (1972), the court found after a review of the undisputed factual record that the College's religious components are so inextricably intertwined with its secular aspects that, under the Establishment Clause, it may not receive direct state funding. (App. 61-62.)¹ For instance, the district court concluded that faculty hiring and admissions decisions do not appear to be made "without regard to religion," noting that 80% of its traditional and 20% of its evening students were Seventh-day Adventists.² (App. 66.)

On appeal, the Fourth Circuit concurred with the district court's legal analysis. The court first recognized the direct applicability of *Roemer*. (App. 10.) The court of appeals found that not only has this Court "never expressly overruled *Roemer*," but also that none of this Court's more recent precedents has effectively overruled *Roemer*; rather,

¹ Contrary to Columbia Union's assertion, the district court did not admit that the College was less sectarian than the colleges allowed to receive aid in *Hunt* and *Tilton v. Richardson*, 403 U.S. 672 (1971). See Pet. at 7. The district court found: "Taken in context, the colleges at issue in *Hunt* and *Tilton* were far less sectarian than plaintiff." (App. 63.)

² The record does not support Columbia Union's statement that "the Catholic colleges granted funding admittedly had even higher percentages of Catholic students." Pet. at 8. The district court made no factual findings with respect to the religiously affiliated colleges that receive State aid.

they reaffirm the distinction between direct and indirect government aid. (App. 12, 20.)

The Fourth Circuit rejected the College's argument that *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), eviscerated *Roemer*'s ban on direct money grants to pervasively sectarian colleges. (App. 13-15.) In particular, the court of appeals was not persuaded by Columbia Union's argument that Sellinger grants are based on the same student "private choices" that rendered the *Witters* grant to a blind pastoral student constitutional (App. 14.) "The state aid at issue here, in contrast to that in *Witters*, reaches a religious school solely as a result of a decision made by the state not the student." (*Id.*, citing *Witters*, 474 U.S. at 488.) (emphasis in original). This is because institutions, not students, apply for Sellinger funds and the decision to fund the institution in the first instance is exclusively the State's. (App. 15.) Moreover, unlike in *Witters*, where aid reached the school as an incidental benefit, a college under the Sellinger program is the primary beneficiary of direct aid and the student – if he benefits at all – is the incidental beneficiary. (*Id.*, citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993).)

The court of appeals next concluded that *Agostini* did not overrule *Roemer*. (App. 15-17.) Although *Agostini*, like *Witters* before it, was contrary to the broad *Roemer* dicta that "no state aid at all" to a pervasively sectarian institution is permissible, *Agostini* did not involve a situation (like the instant case or *Roemer*) "in which aid flows directly to 'the coffers of religious schools' for services provided 'on a school-wide basis.'" (App. 16, quoting *Agostini*, 117 S.Ct. at 2013.) The appeals court distinguished the remedial services "supplemental to the regular curriculum" at issue in *Agostini* from funding the entire budget for many of Columbia Union's core educational courses. (App. 17.)

Finally, the Fourth Circuit found "particularly puzzling" Columbia Union's suggestion that *Rosenberger* overruled *Roemer*. (App. 17.) To the contrary, the court of appeals

explained, "the *Rosenberger* Court took particular pains *not* to overrule *Roemer* but to carefully distinguish it." (App. 18.) While *Roemer* did not apply in a case like *Rosenberger* where a university provided an incidental or indirect benefit such as printing services, *Roemer* remains good law where a neutral state program provides direct money payments to an institution that may be engaged in religious activity. (App. 19, citing *Rosenberger*, 515 U.S. at 842.) The court of appeals noted that for Justice O'Connor, whose concurrence supplied the fifth and decisive vote, the distinction between direct and indirect aid was critical. The court pointed out that in her view the program in *Rosenberger* did not violate the Establishment Clause because funds did "not pass through the [religious] organization's coffers" and were not "a block grant to religious organizations." (App. 19, quoting *Rosenberger*, 515 U.S. at 850 (O'Connor, J., concurring).) Summarizing the body of Establishment Clause jurisprudence on this issue, the court of appeals concluded that "[t]he Supreme Court has never upheld a direct transfer of monies to a pervasively sectarian institution to fund its core educational functions." (App. 21.)

At the same time, the Fourth Circuit was unable to find as a matter of law that Columbia Union is a pervasively sectarian institution. The district court's grant of summary judgment suffered from the "fatal flaws" of resting its conclusion on an incomplete record and considering the record in the light least, rather than most, favorable to Columbia Union. (App. 33.) For example, the panel majority noted that a reasonable fact finder could find that the College's mandatory worship attendance policy reveals that Columbia Union is primarily interested in religious indoctrination at the expense of providing a secular education. (App. 26.) However, a fact finder could also infer that the policy has a limited reach and that religious indoctrination is no more than a secondary objective. (*Id.*)

Not only was the summary judgment record susceptible of conflicting inferences, but the record failed to contain essential evidence of the College's practices. (App. 36-37.)

The appeals court stressed the importance of deciding "difficult constitutional questions dependent on intensely factual determinations" on a full and complete factual record. (App. 34.) The panel majority rejected the concern of Chief Judge Wilkinson, who dissented only on the remand issue, stating that, despite his objection about the scope of such a remand, "the parties may well be able to ease these burdens by stipulating to many of the unresolved factual issues." (App. 36 n. 8.)³

REASONS FOR DENYING THE WRIT

Columbia Union petitions this Court to reverse twenty-three years of Establishment Clause jurisprudence barring direct state aid to pervasively sectarian institutions, even though the court of appeals vacated the judgment against it and remanded for trial the factually-based question of whether the College is pervasively sectarian, and even though this Court has just reaffirmed the very principle that Columbia Union asks this Court to review. Further review of such a question is unwarranted, particularly in the absence of a complete factual record. While Columbia Union insists that the Sellinger program does not involve direct government funding, the remand order leaves open this and many of the other material facts of this case. This Court has consistently refused to issue what amounts to an advisory opinion or to review constitutional questions where, as here, an alternative basis for decision is available. *See, e.g., Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari

³ The Petition is mistaken that the court below indicated the need for "faculty testimony" to determine whether the faculty taught without fear of religious pressures. Pet. at 11. Instead, the panel majority merely cited the approach taken by the *Roemer* district court as one way of gathering evidence of a college's practices.

jurisdiction.”). There is nothing exceptional about this case warranting departure from this rule.

The court of appeals also decided no novel legal issues but merely applied established precedents in holding that the district court should first consider evidence of the College’s practices as well as its policies before determining whether the College is pervasively sectarian. Far from ordering an “intrusive investigation” into Columbia Union’s religiosity, *see* Pet. at 13, the remand order does no more than require the parties to develop evidence in several discrete areas. Indeed, in recognition of the narrow scope of the panel majority’s remand order, the district court has since decided that a two-month discovery schedule is all that will be required to supplement the record. Together with the likelihood of stipulations suggested by the court of appeals, this is scarcely the “parade of horrors” conjured by the Petition. (App. 36 n. 8.)

Nor did the court of appeals decide anything remarkable in recognizing that this Court in *Agostini* reaffirmed the *Roemer* holding just two years ago. In fact, as the court of appeals noted, this Court has never upheld a direct transfer of monies to a pervasively sectarian institution to fund its core educational functions. As *Agostini* and other cases have long recognized, government funding that directly flows to the coffers of a pervasively sectarian school to fund the entire budget for many of its programs violates the Establishment Clause. The sole exception to this principle—where student choice results in an incidental benefit to a religious institution—does not apply here because, as the court of appeals emphasized: “Institutions, not students, apply for Sellinger funds, and the State determines the eligibility of institutions, not students for the funds.” (App. 15, distinguishing *Witters*, 474 U.S. at 488.) The petition should be denied, therefore, because this case presents no question meriting this Court’s review.

I. THE REMAND ORDER RENDERS THIS CASE PREMATURE AND DOES NOT CONSTITUTE EXCESSIVE ENTANGLEMENT.

The court of appeals followed settled law in ordering the parties to develop a full and complete factual record before deciding a difficult constitutional question dependent on intensely factual determinations. (App. 34, citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1949).) *See also Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 883-884 (1982) (White, J., concurring) (approving remand order because “this will result in a trial and the making of a full record and findings on the critical [First Amendment] issues.”). The panel majority correctly observed that in *Bowen*, 487 U.S. at 621, this Court remanded another Establishment Clause case to the trial court for additional fact-finding to determine whether an institution was pervasively sectarian or simply “religiously inspired.” (App. 35.)

While Columbia Union now claims that the remand order sanctions an excessive entanglement that violates First Amendment principles, it previously argued below that it is not pervasively sectarian and might still prevail at trial on this issue, thereby avoiding the necessity for deciding the constitutional claim it presents for review. “The most fundamental principle of constitutional adjudication is not to face constitutional principles but to avoid them, if at all possible.” *United States v. Lovett*, 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring). *See also Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). The College presents no sound reason for departing from this well-established principle of judicial restraint, particularly where the remand order here contemplates further proceedings. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (“[B]ecause the Court of Appeals remanded the case, it is not ripe for review by this Court.”). Denying the writ does not preclude Columbia Union from raising the same issues in a later petition, after full factual

development of the record and the entry of final judgment. *Virginia Military Institute*, 508 U.S. at 946.

Review is also premature because the petition raises many disputed issues of fact to be determined by the trial court on remand. In particular, Columbia Union argues that Sellinger Program funds never flow directly to the "coffers" of any institution, but are placed in special revenue accounts to be used for specified purposes. Pet. at 27. Even the panel's dissenting judge, however, concedes that "Maryland's program provides a direct subsidy" to private institutions. (App. 45) (Wilkinson, C.J., dissenting). At the very least, this issue raises a disputed question of fact. Similarly, Columbia Union presumes that any funds it would receive under the program would be used only for secular activities. Pet. at 27. But this, too, is a question of fact which cannot be presumed at this stage of the proceedings. Even while questioning the term "pervasively sectarian," two Justices of this Court have acknowledged that "funding to pervasively sectarian institutions may impermissibly advance religion" and that it is necessary and relevant to examine how an institution "spends its grant" and whether "the funds are in fact being used to further religion." *Bowen*, 487 U.S. at 624 (Kennedy, J., with whom Scalia, J., joins, concurring). For example, whether direct state aid to an institution will "supplement" its core educational program or "supplant" educational burdens that might otherwise be borne by the institution, see *Agostini*, 117 S.Ct. at 1013, is precisely the line of inquiry contemplated by the court of appeals' remand order. The petition should be denied for these reasons alone in light of these unresolved factual issues.

Moreover, contrary to Columbia Union's argument, a court conducting this sort of examination does not engage in any excessive entanglement with religion. In fact, the panel majority found support for a list of the characteristics of a pervasively sectarian institution in seven decisions of this Court. (App. 24, citing *Roemer*, 426 U.S. at 755-58; *Hunt*, 413 U.S. at 743-44; *Tilton*, 403 U.S. at 685-86; *School*

District of Grand Rapids v. Ball, 473 U.S. 373, 384 n.6 (1985); *Meek v. Pittenger*, 421 U.S. 349, 356 (1975); *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 767-68 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 615-18 (1971).)⁴

Columbia Union is wrong, therefore, in arguing that the remand order mandates an impermissible judicial intrusion into matters of religion. Pet. at 14-16. This contention ignores not only this Court's decisions that sanction such an inquiry, but also the narrow scope of the panel majority opinion, which identified only four areas in which the record was found to be lacking:

- How traditional liberal arts or mandatory religion courses are taught at the College. (App. 27.)
- How or why the College selects its faculty, including evidence of its hiring procedures, the criteria it applies, and the nature of the applicant pool. (App. 30.)
- Whether the College has followed a religious preference in hiring for reasons other than stacking the faculty with members of the Seventh-day Adventist faith. (App. 30.)
- An analysis of the student admission and recruiting criteria. (App. 31.)

It is difficult to reconcile this limited fact-finding with Columbia Union's suggestion of an "extensive investigation into [its] religious practice." Pet. at 14. None of these areas requires the trial court to become entangled in matters involving "religious doctrine, polity and practice." *Jones v. Wolf*, 443 U.S. 595, 603 (1979) (permitting resolution of disputes involving religious institution where neutral

⁴ These characteristics include: mandatory student worship services; an express preference in hiring and admissions for church members; academic courses implemented with the primary goal of religious indoctrination; and church control over the board of trustees and financial expenditures. (App. 24.)

principles of law can be invoked). Not only does Columbia Union ignore the limited discovery period and the likelihood of stipulations in exaggerating the practical effect of the remand, it ignores that *Roemer* authorized the very examination ordered by the panel majority. (App. 36 n. 8, citing *Roemer*, 426 U.S. at 764-65.) The Petition does not even attempt to demonstrate that this aspect of *Roemer* has been superseded or otherwise merits review.

To the contrary, this Court in *Agostini* recently affirmed this aspect of *Roemer* and similarly determined that the government's review and inspection of grantee religious institutions in *Bowen* did not constitute excessive entanglement. *Agostini*, 117 S.Ct. at 2015, citing *Roemer*, 426 U.S. at 764-65 and *Bowen*, 487 U.S. at 615-17. Thus, it remains good law that the remand order may properly direct the trial court to broaden its inquiry to include evidence of Columbia Union's practices as well as its policies.

Because this Court in *Agostini* and *Bowen* has repeatedly reaffirmed that the *Roemer* inquiry does not constitute excessive entanglement, it is difficult to understand the College's reliance (Pet. at 15-16) on *New York v. Cathedral Academy*, 434 U.S. 125 (1977), a much older decision. *Cathedral Academy* merely forbade on entanglement grounds a detailed audit of a religious school's expenditures to assure that none would be used for sectarian activities. The *Roemer* issue of whether the school was pervasively sectarian was not at issue and, in fact, *Roemer* is not even cited in the decision. Nothing in *Cathedral Academy* insulates the College from routine judicial review. In *Bowen*, by contrast, the Court criticized the district court for failing to explore with "any particularity" evidence that would warrant classification of the grantees as pervasively sectarian. 487 U.S. at 620. In other words, the College's expansive reading of *Cathedral Academy* cannot survive *Bowen*.

Similarly, Columbia Union's argument that the result below discriminates among religions does not constitute excessive entanglement or otherwise warrant review by this Court. Pet. at 18-20. The *Roemer* cases require a court to distinguish between a "pervasively sectarian" institution and a "religiously affiliated" one. *Roemer*, 426 U.S. at 758-59; see also *Bowen* 487 U.S. at 621 ("It is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is religiously inspired."). As Justice O'Connor recognized in *Rosenberger*, resolving Establishment Clause cases requires "sifting through the details" and making a fact-based judgment. See 515 U.S. at 847 (O'Connor, J., concurring) ("Such judgment requires the courts to draw lines, sometimes quite fine, based on the particular facts of each case."). The Catholic colleges that receive Sellinger funds were required to present the same kind of evidence Columbia Union now claims constitutes proof of an intrusive and discriminatory procedure. But no denominational preference results simply because the College may in the future fail to persuade the district court that it is on one side of the line instead of the other.

Finally, this Court long ago rejected the argument that the remand order places on Columbia Union unconstitutional pressure to disavow its religious beliefs. See Pet. at 20-21. "A refusal to fund protected activity, without more, cannot be equated with a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980). Thus, this Court has refused to find that First Amendment rights are not fully realized unless subsidized by the State. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983). Far from imposing on the College an unconstitutional condition on the receipt of funds, the panel majority's analysis simply assures that no public monies are spent on religious indoctrination. (App. 37.) In sum, the remand order has a rational basis and is not "aimed at the suppression of dangerous ideas." *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 407 (1984) (Rehnquist, J. dissenting), quoting *Cammarano v. United*

States, 358 U.S. 498, 513 (1959). Nowhere does the Petition attempt to show that these precedents require review.

II. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S ESTABLISHMENT CLAUSE PRECEDENTS AND PRESENTS NO CONFUSION OR CONFLICT AS TO THE APPROPRIATE LEGAL STANDARD.

Review is also unwarranted because the court of appeals decided nothing exceptional in unanimously agreeing that the *Roemer* line of cases prohibiting direct state funding of a pervasively sectarian institution provides the appropriate legal standard in this case. (App. 10) ("We begin our inquiry recognizing the direct applicability of *Roemer*."); (App. 47) (Wilkinson, C.J., dissenting) ("*Bowen*, *Roemer*, and *Hunt* remain the law and they require this court to uphold Maryland's denial of funding to Columbia Union if it is a pervasively sectarian institution."). That standard prohibits the direct transfer of public monies to fund the core educational functions of a pervasively sectarian institution. There is no merit in Columbia Union's argument that this pervasively sectarian analysis is "constitutionally suspect." Pet. at 23.

The panel majority correctly recognized that Columbia Union's argument is fatally flawed by its refusal to acknowledge that this Court's recent Establishment Clause cases—*Agostini*, *Rosenberger*, and *Witters*—not only fail to overrule *Roemer*, but "reaffirm[]", as the Court has on many other occasions, the distinction between direct and indirect government aid." (App. 20.) Thus, the court of appeals was careful to establish that the "state aid at issue here, in contrast to that in *Witters*, reaches a religious school solely as a result of a decision 'made by the state' *not* the student." (App. 14, quoting *Witters*, 474 U.S. 488).

Contrary to Columbia Union's argument that this distinction is a mere formality, Pet. at 24, the panel further explained that under the Maryland program (1) institutions, not students, apply for State funds, (2) the State determines the eligibility of institutions, not students, for the funds, (3) although the amount of funds given to an institution is tied to the number of students attending it, the decision to fund the institution in the first instance is exclusively the State's, and (4) the State pays such funds directly to an institution. (App. 15.) The court of appeals recognized that these distinctions are at the heart of Establishment Clause values equating the direct transfer of public monies to religious activities with "affirmative involvement characteristic of outright government subsidy." (App. 20-21, quoting *Nyquist*, 413 U.S. at 774, 806-07 (Rehnquist, J., concurring in part and dissenting in part) (other citations omitted).)

The court below also properly distinguished *Committee for Public Education v. Regan*, 444 U.S. 646 (1980), as a case not involving the provision of direct aid to the core educational functions of a religious school. (App. 17.) Columbia Union is therefore mistaken that in *Regan* the Court abandoned its established prohibition on direct state aid to pervasively sectarian institutions. Pet. at 24. Instead, that decision upheld reimbursement to parochial schools only for costs and expenses incurred in administering and grading state-sponsored and mandated standardized testing separate and apart from, and thus supplemental to, the parochial school's educational program. (App. 17, citing 444 U.S. at 656.) Such reimbursements resembled the Title I remedial services at issue in *Agostini* that did not advance the religious mission of the institution, were "supplemental to the regular curricula" taught to all students, and did not "supplant" or "reliev[e]" sectarian schools of costs they otherwise would have borne in educating their students." (App. 17, quoting *Agostini*, 117 S. Ct. at 1013 (quoting *Zobrest*, 509 U.S. at 12).) See also App. 18, citing *Rosenberger*, 515 U.S. at 842 ("The *Rosenberger* Court [also] expressly found that *Roemer* did not apply where the

University provided an 'incidental,' indirect benefit (i.e., printing services) for all qualifying recipients, *not* 'direct money payments' as was provided to the colleges in *Roemer*." (emphasis in original).

In addition to its failure to show how the Fourth Circuit decision is in any way inconsistent with this Court's precedents, Columbia Union has also failed to identify a conflict between the decision below and other court of appeals decisions. See Pet. at 16-18. Indeed, neither *Hartman v. Stone*, 68 F.3d 973 (6th Cir. 1995), nor *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996), even involves the applicability of *Roemer* or the ban on direct State aid to a pervasively sectarian institution. Thus, neither decision conflicts with the court of appeals' decision in the instant case.

In contrast to the instant case, in *Hartman* the Sixth Circuit stated that the Establishment Clause was not directly at issue because the benefits provided were inconsequential. See 68 F.3d at 982 ("[A]n examination of the alleged benefits in this case leads us to conclude that they lack sufficient substance to warrant constitutional concern."). In that case, the Army issued regulations prohibiting on-base family child care providers from engaging in religious practices while providing day care services. The Sixth Circuit not only held that the regulations violated the providers' free exercise of religion but also found that the benefits conferred on the providers were either too indirect or too insubstantial to raise Establishment Clause concerns. *Id.* By contrast, the court of appeals in the instant case summarized the issue here as "the Establishment Clause implications of a 'neutral [state] program' providing 'direct money payments to an institution' that may be 'engaged in religious activity.'" (App.19, quoting *Rosenberger*, 515 U.S. at 842.)

Similarly, *Catholic University* does not conflict with the decision below because it provides no support to Columbia Union's argument that the civil courts lack jurisdiction to

inquire into matters of religion. Pet. at 18. There, the District of Columbia Circuit merely applied governing law in deciding that excessive entanglement occurs where a government agency investigates a sectarian college's decision to deny tenure to a professor of canon law. That tenure decision was not reviewable by the courts, according to the concurring judge, because it required the court to preempt the decision-making authority of the Vatican. 83 F.3d at 476 (Henderson, J. concurring). On the other hand, "that a sectarian institution can take secular, and therefore reviewable, action has long been recognized by many courts, including ours." *Id.* at 473 (citations omitted). Ironically, Columbia Union first asked the courts to redress the denial of its State aid, even though it now claims the courts are incompetent to finally resolve its suit. Columbia Union plainly took secular action when it applied for Sellinger funds and instituted this action; it may not escape judicial review simply because of its religious affiliation.⁵

Similarly misplaced is Columbia Union's argument that the decision below conflicts with *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 119 S.Ct. 496 (1998), and that the latter case erases the profound distinction between direct aid to a pervasively sectarian institution as opposed to students or parents. See Pet. at 26. On the contrary, *Jackson* confirms the absence of any conflict requiring this Court's intervention. The Supreme Court of Wisconsin emphasized that the voucher program at issue was necessarily amended to comply with the constitutional principles of *Agostini* and *Witters*. The original voucher program found constitutionally infirm provided direct grants to pervasively

⁵ In *Catholic University* the sectarian nature of the institution was not at issue. Under Title VII the courts routinely determine whether the defendant is sufficiently religious to qualify for an exemption under 42 U.S.C. § 2000e-1(a) as a "religious corporation, association, educational institution or society." See e.g., *Killinger v. Samford University*, 113 F.3d 196 (11th Cir.1997).

sectarian schools. Under the amended program, which was upheld by the court, "aid flows to sectarian private schools only as a result of numerous private choices of the individual parents of school-age children [T]he program was amended so that the State will now provide the aid by individual checks made payable to the parents." 578 N.W.2d at 618.

Moreover, the Wisconsin court concluded that, consistent with the precedent of this Court, "not one cent flows from the State to a sectarian private school ... except as a result of the necessary and intervening choices of individual parents." 578 N.W.2d at 618. The result was as this Court intended, wherein "[n]o reasonable observer is likely to draw from [these facts] an inference that the State itself is endorsing a religious practice or belief." *Id.*, quoting *Witters*, 474 U.S. at 493 (O'Connor, J., concurring).

The Wisconsin case, like *Agostini* before it, serves to affirm the *Roemer* distinction between direct and indirect government aid. The facts before that court, unlike *Roemer* and the instant case, did not involve the unique situation where "aid flows directly to 'the coffers of religious schools' for services provided 'on a school-wide basis.'" (App. 16, quoting *Agostini*, 117 S. Ct. at 2013.) As the panel in the instant case carefully reasoned, *Agostini* holds that "government aid flowing to even a pervasively sectarian institution does not impermissibly advance religion *if* it reaches the institution as a result of private independent choices of the individual rather than state decisionmaking, and if it 'supplements' rather than 'supplant[s]' the colleges core educational functions." (App. 17) (emphasis in original).

It is equally clear that neither *Agostini* nor the Wisconsin case hold that direct state funding that flows to the coffers of a pervasively sectarian institution to fund the budget of an institution's core educational courses would pass constitutional muster. (App. 17.) The central teaching of *Roemer* remains undisturbed: "when a college is so

pervasively sectarian that its religious mission 'permeates' its educational functions, the government cannot provide direct money grants even to fund the college's secular subjects because 'religious and secular function [a]re inseparable.'" (*Id.*, quoting *Roemer*, 426 U.S. at 750.)

In light of this Establishment Clause precedent and absent any conflict of judicial decisions, Columbia Union is left with little support for certiorari review. As an alternative, it even suggests that the sovereign State of Maryland is constitutionally obligated to abrogate the intent of the Sellinger program—direct support for private institutions of higher education—by turning it into a financial aid program for individual students.⁶ Pet. at 25. In the end, its analysis does not justify review by this Court. The legal issues in the instant case were appropriately disposed of by the panel below, carefully and analytically following the precedent placed before it. This Court's jurisprudence remains intact. Without a sufficient factual record at hand, the consideration of a dramatic departure from such jurisprudence is best left for another day.

CONCLUSION

For the reasons stated, the petition should be denied.

⁶ The panel majority recognized that ordering the State to provide Sellinger funds directly to students is not more narrowly tailored than "simply denying funds to the one affected institution and permitting the statute, which otherwise operates within the bounds of the Constitution, to stand." (App. 9 n.2.)

Respectfully submitted,

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No. 98-1509

CLERK

IN THE
Supreme Court of the United States

COLUMBIA UNION COLLEGE,*Petitioner,*

v.

EDWARD O. CLARK, JR., *et al.**Respondents.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF AMICI CURIAE COUNCIL ON RELIGIOUS FREEDOM,
NORTHWEST RELIGIOUS LIBERTY ASSOCIATION,
SEVENTH-DAY ADVENTIST CHURCH STATE COUNCIL,
THE INTERFAITH RELIGIOUS LIBERTY FOUNDATION,
AND WALTER PONTYNEN IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICI CURIAE*

Pursuant to Rule 37.2, the letters from the parties consenting to the filing of this brief are being filed simultaneously with this brief. The Council on Religious Freedom, the Northwest Religious Liberty Association, The Seventh-day Adventist Church State Council, The Interfaith Religious Liberty Foundation and Walter Pontynen have been or are associated with religious schools and colleges. Amici desire to protect the legal rights of these schools to vigorously pursue their religious missions. Interests of each amici are further set out in the appendix attached hereto.

SUMMARY OF ARGUMENT

In its rush to gain state aid, petitioner advances arguments that would undermine the constitutionally protected status of religion. Never has the Court indicated that the factual inquiry involved in deciding if a college is pervasively sectarian involves excessive entanglement between church and state. Further, Columbia Union is in no position to raise such a claim, as in the courts below petitioners argued that the college is not pervasively sectarian, thereby minimizing any potential entanglement concerns.

Under the Constitution, religion is not equal to other institutions or ideologies, but rather it has a special status that brings with it privileges and corresponding responsibilities. Petitioner seeks to rid itself of certain responsibilities, namely that of receiving only private funding and support, by arguing that Columbia Union should

* No other person other than counsel for amici curiae has contributed to the authoring of this brief, in whole or in part, and no person or entity other than amici curiae has made a monetary contribution to the preparation or submission of this brief.

be treated "equally" with other largely secular colleges. Yet those same arguments would undermine the protections Columbia Union receives in the areas of hiring, firing and regulation of student life that allows College leadership to advance its religious mission. Amici, some of who represent the interests of other Seventh-day Adventist educational institutions, are concerned that petitioner's arguments, if accepted, would threaten the ability of other religious colleges to wholeheartedly pursue their missions.

But if the "pervasively sectarian" category is to be discarded on the rubbish heap of outmoded constitutional metaphors, which amici believe would be disastrous, such an act should not be contemplated when it has not been legally established that such an institution is even before this Court. The petition should be rejected and the fourth circuit's remand for further fact-finding should be affirmed.

REASONS THE WRIT SHOULD BE DENIED

I. THE CONSTITUTION BOTH ALLOWS AND REQUIRES CAREFUL FACT-FINDING TO DECIDE IF A COLLEGE IS PERVASIVELY SECTARIAN.

The special legal status given to religious entities must be protected from misuse by non-religious groups that fraudulently seek protection against regulations from which religious institutions are exempted. Likewise, pervasively religious colleges should not be allowed to downplay their true religious character in order to gain public funds. Thus, courts must engage in careful and thorough fact-finding to decide if a college is pervasively sectarian. Entanglement concerns raised by such an inquiry are greatly diminished when a college denies that it is pervasively sectarian, as Columbia Union has done in the courts below.

While the state will treat a "pervasively sectarian" school differently from its secular counterparts, including those that are religiously affiliated, such treatment is not discrimination among religions. Rather, it is merely the different approaches the constitution mandates that the state takes towards religion and non-religion. Any pressure to disavow religious beliefs and practices that such differing treatment may place on religious entities is more than balanced by the favorable protections and privileges religious groups receive under our laws and constitution.

A. Courts Must Look Beyond Course Handbooks And Policy Statements In Deciding If A College Is Pervasively Religious And Entanglement Concerns Raised By The Inquiry Are Minimized When A College Denies That It Holds That Status.

This Court's decisions indicate that a careful and thorough factual examination of a college's policies *and* practices is necessary to decide whether it is pervasively sectarian, and nowhere has the Court suggested that such an inquiry violates the constitution. *Roemer v. Board of Public Works*, 426 U.S. 736, 755 (1976); *Hunt v. McNair*, 413 U.S. 734, 743-44 (1973); *Tilton v. Richardson*, 403 U.S. 672, 681 (1971). The *Roemer* decision is an example of the extensive fact-finding that the Court has considered appropriate in deciding if a college is pervasively sectarian. In *Roemer*, which involved the very grant program at issue here, this Court listed findings taken from "several weeks of trial" (*Roemer*, 426 U.S. at 758) upon which the "pervasively sectarian" inquiry was based. These included the following factual findings about the colleges at issue:

- (1) Despite their formal affiliation with the Catholic Church, the colleges are characterized by a high degree of institutional autonomy. *Id.* at 755;

- (2) None of the colleges receives funds from or makes reports to the affiliated church. *Id.*;
- (3) The church is represented on their board, but it was not shown that in any instance any church considerations entered into college decisions. *Id.*;
- (4) Worship attendance is not required. *Id.*;
- (5) Encouragement of spiritual development is only a secondary objective at those institutions. *Id.*;
- (6) At none of the institutions does this encouragement go beyond providing the opportunities for religious experience. *Id.*;
- (7) Religious indoctrination is not a substantial purpose or activity of the institutions. *Id.*;
- (8) Although religion and theology courses are taught at each of the colleges, such courses only supplement a curriculum covering the spectrum of a liberal arts program. *Id.*;
- (9) Non-theological courses are taught in an atmosphere of intellectual freedom and without religious pressure. *Id.*;
- (10) Each of the colleges subscribes to and abides by the 1940 Statement of Principles of Academic Freedom of The American Association of University Professors. *Id.*

These findings require an inquiry that goes well beyond printed policy statements and bulletin blurbs. Items 5, 6, 7, 9 and 10, relate to the spiritual and academic atmosphere on campus and in the classrooms and would require testimony from some combination of administrators, faculty and students. While an inquiry as to items 1, 3 and 4 could begin with a review of policy statements or governing documents, a careful review would also need testimony from those involved in the governance and administration of the college. These factual inquiries were the results of a several week trial. *Id.* at 758.

But the present case has had no such forum for factual inquiry, either at the administrative stage or during the court proceedings. In the district court proceedings there was no trial or fact-finding hearing. Pet. App. 56a. In the original adjudication of the case by the Maryland Higher Education Commission there was no administrative hearing. Pet. App. 58a. The Commission "did not review any 'statistics' regarding how Columbia Union's policy actually affected student admissions and faculty hiring." Pet. App. 5a. In its administrative decision, the Commission noted that all information it received about Columbia Union came from written material submitted by the college. Pet. App. 105a. The Commission stated that it had not audited courses, spoken with students or faculty members or conducted "any other type of on-campus subjective assessments" regarding the religiosity of Columbia Union. Pet. App. 105a.

Prior to *Roemer*, this Court recognized the need of looking beyond mere policy statements in the pervasively sectarian inquiry. *Tilton v. Richardson*, 403 U.S. 672, 681 (1971). In *Tilton*, at issue was the constitutionality of a federal law that provided construction grants for private colleges and universities. The grants went to certain church-related institutions, but were to be used exclusively for secular educational purposes. *Id.* at 674-75. The Court acknowledged that it would be unconstitutional for such aid to go to pervasively sectarian colleges or universities. The Court referred to a "composite profile" of a pervasively sectarian college whose characteristics would disqualify it for state aid. The profile involved the following elements, all of which require a careful factual inquiry:

- (1) The college imposes religious restrictions on admissions;
- (2) requires attendance at religious activities;

- (3) compels obedience to the doctrines and dogma of the faith;
- (4) requires instruction in theology and doctrine; and
- (5) attempts to propagate a particular religion. *Id.* at 682.

In *Tilton*, certain of the religiously affiliated colleges had institutional documents that placed religious limits on academic freedom. *Id.* at 681. But the Court chose to move beyond the policy statements, and noted that "other evidence showed that these restrictions were not in fact enforced and that the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination." *Id.* The parties in *Tilton* had stipulated that the courses at the colleges were taught according to the "academic requirements of the subject matter and to the teacher's concept of professional standards." *Id.*

Unlike *Tilton*, the issue of academic freedom and the religious content of "secular" academic courses is one of the main points of contention in the present case. Based on a reading of the academic bulletin, the district court below concluded that religion dominates Columbia Union's academic courses. Pet. App. 65a-66a. The court of appeals held that the evidence on this point was open to opposite inferences, and that further fact finding was necessary to uncover the truth. Pet. App. 28a-29a.

Similarly, in *Hunt v. McNair*, 413 U.S. 734 (1973), the record established that the colleges at issue had "no religious qualifications for faculty membership or student admission." *Id.* at 743-44. The present case is markedly different, as Columbia Union ostensibly uses religious criteria in faculty hiring and firing and in student admissions. Further, the Commission specifically noted that it had not reviewed any statistics regarding how Columbia Unions policies affected student admissions and faculty hiring. Pet. App. 125a, 126a.

Nowhere in the *Hunt, Tilton, Roemer* trilogy did the Court hold that a careful examination of the religious elements of the subject colleges raise excessive entanglement concerns. This was no doubt due in part to the fact that the colleges at issue in those cases did not claim to be pervasively sectarian, and thus *Lemon* "excessive entanglement" concerns were minimized. As this Court has stated, the "degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institutions. In finding excessive entanglement, the Court in *Lemon* relied on the 'substantial religious character of these church-related' elementary schools." *Hunt*, 413 U.S. at 746, citing, *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971). The obverse of this is where, as in *Hunt, Tilton*, and *Roemer*, the schools are only religiously affiliated and not pervasively sectarian. In these cases, the Court viewed the entanglement questions as diminished and held that the state inspections at issue would not cause a constitutional concern. *Tilton*, 403 U.S. at 685-88; *Hunt* 413 U.S. at 746-47; *Roemer*, 426 U.S. at 764-65.

In seeking the Sellinger funds, petitioner argued that Columbia Union does not fall under the pervasively sectarian definition. It insisted that under *Roemer, Hunt* and *Tilton*, "Columbia Union's institutional structure plainly does not support the conclusion that the College is pervasively sectarian." (Brf. of Appell. in the U. S. Ct. of App. for the Frth. Circ. p. 25.) A large part of petitioner's appeals brief below was spent in developing this argument. (*Id.* at 23-35; listing the similarities between Columbia Union and those colleges found not to be pervasively sectarian in *Roemer*.)

Petitioner cannot have it both ways. It cannot fairly argue that Columbia Union is not pervasively sectarian, and then argue that Columbia Union cannot be reviewed for religious content because of entanglement concerns. This is not

arguing alternatively, it is arguing contradictorily. Once Columbia Union makes the claim that it is *not* pervasively sectarian, it essentially loses its ability to complain of excessive entanglement arising from the subsequent state inquiry for two reasons. First, Columbia Union's very denial is an invitation to state scrutiny of its religious nature to determine if indeed this denial is true. Secondly, by its denial Columbia Union abandons, at least for purposes of seeking Sellinger funds, the claim that its religious mission is pervasive throughout its programs, and the entanglement concerns arising out of a state inspection are greatly diminished, as noted in *Hunt* and *Lemon*.

Because of its earlier denial of Columbia Union's pervasively sectarian status, the cases petitioner cite to support its claim that the lower courts proposed factual inquiries will produce "excessive entanglement" are inapplicable. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979); *New York v. Cathedral Academy*, 434 U.S. 125 (1977). These cases involved parochial secondary schools, presumed to be pervasively sectarian, and thus dealt with a heightened entanglement standard, unlike the present case. Columbia Union, as a college, is presumed *not* to be pervasively sectarian, and in light of its denials below in this regard, cannot fairly argue that it should have the advantage of the excessive entanglement concerns found in these cases.

In fact, *Cathedral Academy* undercuts petitioner's larger argument that Columbia Union should receive state funds. The case is not about identifying pervasively sectarian entities, but rather about the constitutional problems of giving funds to such entities. *Cathedral Academy* holds that state money paid to fund secular parts of pervasively sectarian schools will inevitably result in excessive entanglement of church and state, because under the

constitution the use of those funds must be carefully monitored or audited by the state. *Id.* at 132-33.

Ironically, this evil is precisely what petitioner invites. It rejects the notion of an initial government determination of Columbia Union's pervasively sectarian status, but essentially invites the government to participate in an ongoing, never-ending audit of the college's programs to ensure that state funds are not used for sectarian purposes. (See Pet's. Pet. for Writ of Cert., pp. 23, 27). Petitioner's proffered cure for entanglement is a worse malady than the ill sought to be remedied. The proposed solution would lead to a more prolonged, and thus more intrusive, fact-finding than the one which petitioner argues against here.

B. The Funding Duties Borne By Religious Entities Are More Than Balanced By The Privileges And Protections Given Religious Schools.

Any pressure felt by Columbia Union to compromise its religious mission to gain state funding is more than offset by the legal privileges and protections a religious college enjoys in pursuing its religious mission. In applying the First Amendment guarantees of religious freedom, or in construing federal statutes in light of these freedoms, federal courts have conferred on religious entities rights and privileges not enjoyed by similarly situated secular groups.

Under the constitution, pervasively sectarian organizations have the right to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952). Religious organizations have absolute discretion in regards to the employment of ministers, rabbis, priests and teachers of theology or religion, and are shielded from nearly

all claims brought under state and federal employment statutes by these employees. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *McClure v. Salvation Army*, 460 F.2d 553, 558, 560 (5th Cir. 1972).

The pervasively sectarian standard has also been used in creating or construing statutes to give religious entities exemptions from generally applicable regulatory requirements. Pervasively sectarian schools are exempted from the jurisdiction of the National Labor Relations Board and can prevent their staff from unionizing. *NLRB v. Cath. Bishop of Chicago*, 440 U.S. 490, 502 (1979). Under 42 U.S.C. § 2000e-2(e)(2), religious entities have the right to hire and fire their employees, from presidents to janitors, on the basis of religious beliefs or criteria. *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). If petitioner's arguments are accepted about the over-intrusiveness of the "pervasively sectarian" inquiry, then these exemptions must also be unconstitutional, as they require the very same inquiry. *EEOC v. Kamehameha*, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 510 U.S. 963 (1993); *EEOC v. Miss. College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

Secular private colleges, even those that are religiously affiliated, are not allowed to hire and fire on the basis of religion. While religiously affiliated colleges may be able to use religious criteria in the hiring of chaplains and religion teachers, the burden is on the college to prove that these positions are religiously related. *Welter v. Seton Hall Univ.*, 608 A.2d 206 (N.J. 1992) (Ministerial status of nun employees did not allow university exemption from employment regulations where job positions were purely secular.) These types of private colleges cannot regulate student admissions and student behavior based on religious

moral standards. *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 117 (D.C. Cir. 1987) (University must provide benefits to student gay club even if club ideals contrary to religious goals of school.) Neither are these colleges exempt from union organizing.

Irrespective of whether or not Columbia Union has been legally found to be pervasively sectarian, the record below demonstrates that the college is the beneficiary of the protections and privileges accorded highly religious institutions. The district court below found that Columbia Union College (CUC) had the following characteristics:

1. CUC's bylaws require at least 34 out of the 38 voting members of its board of trustees be members of the Seventh-day Adventist ("SDA") Church. Pet. App. 62a;
2. CUC requires its students to attend religious services. Pet. App. 63a;
3. Students who live in the college's residence halls must attend three out of six weekly worship options in the residence halls. Pet. App. 63a;
4. CUC requires students to take religion courses, courses which the district court found to be aimed at inculcating the SDA faith rather than teaching theology as an academic discipline. Pet. App. 64a;
5. CUC's Policy Handbook for Administration and Faculty directs faculty to "bear in mind their peculiar obligation as Christian scholars and members of an SDA college." Pet. App. 65a;
6. The faculty "have complete freedom so long as their speech and actions are in harmony with the philosophies and principles of the college -- an SDA institution of higher education." *Id.*

7. CUC does not subscribe to the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors. *Id.* at n.11;
8. The description of several of CUC's nominally secular academic departments are replete with references to religion. Pet. App. 66a;
9. Unlike the colleges in *Roemer* and *Hunt*, faculty hiring and student admissions decisions are not made without regard to religion. CUC's Human Rights Policy reserves the right "to give preference in employment of faculty and staff and admission of students to members of the [Seventh-day Adventist Church]." Pet. App. 66a;
10. CUC's admission application asks applicants to state their religious affiliation. Pet. App. 66a; and
11. CUC's Bulletin states it "welcomes applications from all students whose principles and interests are in harmony with the policies and principles" of the Seventh-day Adventist Church. Pet. App. 66a-67a.

Most of these elements could not legally be found in a state funded secular private college, even in those with a religious affiliation. These elements give Columbia Union a tremendous advantage in pursuing its unique religious mission. Such an advantage, properly understood and appreciated, more than offsets the "pressure" brought to bear on a wholly religious college by the enticement of state funding. The desired "intrusion" of state funding is put into context by the less desirable "intrusion" of state regulation and oversight that inevitably and constitutionally must accompany such funding. It may indeed be unlawful, as petitioner argues, to condition receipt of a government benefit on the surrender of a constitutional right. But a college's act of accepting state money is itself the surrender of the constitutional right to be free from state intrusion, as funding is a form of state intrusion. Petitioner cannot

coherently complain that Columbia Union's religious right to be free from state intrusion is violated by the state's refusal to intrude, just because the particular intrusion at issue, state funding, is considered desirable by petitioner.

II. THE CONSTITUTION STILL RECOGNIZES PERVASIVELY SECTARIAN INSTITUTIONS AND STILL PROHIBITS DIRECT STATE AID TO SUCH ENTITIES.

The constitution can only protect that which the Court can define. If this Court cannot distinguish between religious and non-religious organizations, it will have no basis for treating religious entities differently from their secular counterparts. The "pervasively sectarian" category is an integral part of this analysis, as it is the measure of when an entity, such as a college or university, is sufficiently religious to be due full legal protections accorded truly religious entities. And this Court's jurisprudence still holds that the state cannot directly fund or subsidize pervasively sectarian schools. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993) (no direct subsidy to religious schools); *Witters v. Wash. Dep't of Serv. For the Blind*, 474 U.S. 481, 487 (1986) (no direct aid, whether cash or in kind, to religious school).

Petitioner's argument that *Witters* abrogated this "no direct funding" rule is profoundly misguided. In *Witters*, the Court found that the state aid ultimately flowing to a wholly religious school was *not* the result of state action. Rather, it was based on the "genuinely independent and private choices of aid recipients." *Id.* at 487. Petitioner's argue here that because the formula to calculate the amount of the Sellinger grant given to a college is based on student attendance at that college, that the *Witters* exception is applicable. (Pet's. Pet. For Writ of Cert., p. 24-25) But if this reasoning is accepted, there will be no practical limit to the amount of money that can flow from state

coffers to religious schools. State legislatures could massively fund pervasively sectarian colleges, as long as that funding was calculated on the number of enrolled students. As a matter of constitutional law, this cannot be right.

What petitioner overlooks is that along with the "state action" distinction, also critical in *Witters* was the "state of mind" issue, in that the state did not have a primary purpose to advance religion. Rather, the state gave money to individual grantees who had a broad range of educational choices, only a portion of which were religious. The state in *Witters* was funding the purposes of a private person, who may or may not have made religious choices, and thus the state could not be accused of having a primary purpose to advance religion. Any advancement of religion was only "incidental" to the purposes of the grant program. In any year, any given religious school may or may not have received state funds, depending on the private, independent choices of individual students.

But under the Sellinger program it would be the choice of the state to send state money directly to all qualified religious colleges every year. The private choices of the students would merely determine the size of the check the state would send to those colleges. It is not that the state check would be sent directly to Columbia Union rather than the student that is important, as petitioner dwells on. (Pet's. Pet. For Cert., p. 24-26.) Rather, the problem would be the state's choice, pre-existing any private choice of a student, to send funds to Columbia Union knowing full well the religious character of the school. This choice runs afoul of the *Lemon* test, which prohibits legislation from having either the purpose or primary effect of advancing religion, and is the kind of "direct subsidy to the religious school from the State" that this Court disapproved in *Witters*, 474 U.S. at 487.

Petitioner's attempt to analogize Sellinger funds to the state payments made to a printer on behalf of a student religious group in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) is likewise inapt. The payments in *Rosenberger* never went to the religious student group, but directly to a secular printer. This assured, without need for monitoring and fears of entanglement, that the money went to its intended use. To compare this with Sellinger funds going to "special revenue accounts" to be used for secular purposes is specious. The religious colleges themselves would be the ones to administer the special revenue accounts, not an independent secular entity as in *Rosenberger*. The fact that accounts would be audited by the state merely raises once again the entanglement issue that so concerns petitioners elsewhere in their brief.

Rosenberger is less of a free exercise/establishment case and more of a free speech case decided according to limited public forum principles. Religious groups must have equal access to forums that the state has created when access is granted to similar but non-religious groups. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). Relying on *Lamb's Chapel*, the *Rosenberger* Court held that the school created "a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." *Rosenberger*, 515 U.S. at 830.

Thus, not only does the distinction in *Rosenberger* between the money being paid to the printer versus to the religious group lessen entanglement concerns, but the payment is also not really a subsidy, but a state provision of a "public forum," in this instance a newspaper. *Id.* Columbia Union is not a public forum, and the Sellinger funds would not be used to create such a forum. The funds would be used directly by Columbia Union to further its own, unique educational mission.

Finally, for reasons discussed in the previous section, Columbia Union is ill-suited to raise arguments that the constitutional law of pervasively sectarian institutions should be changed. As the court of appeals below noted, there is an insufficient record to rule Columbia Union as pervasively sectarian. Dramatic changes to the highly sensitive First Amendment category of pervasively sectarian entities should not be contemplated when it has not been established that such an entity is before the Court. On the present record, the Court could not fully explore the implications to a pervasively religious school's methods and mission any such change in the law would entail. The actual classroom practices of faculty, the realities of student life, the role of administrative oversight of academic freedom; the uniqueness of these issues on a pervasively religious campus could not be considered in this case. This is reason enough to affirm the remand of this case for further findings of fact.

III. THE Pervasively SECTARIAN CATEGORY PROTECTS THE ABILITY OF RELIGIOUS SCHOOLS TO CARRY OUT THEIR SPIRITUAL MISSIONS.

Amici include persons presently or previously associated with a wide range of Seventh-day Adventist institutions, including church leaders who currently represent the religious liberty interests of a number of Adventist colleges and universities. Amici are concerned that petitioner's invitation to abandon the pervasively sectarian constitutional category is a call, albeit unintentional, to undermine the special status that religion and religious organizations have in our constitutional scheme. Petitioner's alternative to the present framework is for the state to distribute aid equally and neutrally to religious and non-religious schools and for the government to monitor the use of those funds to assure

that they are used for purely secular purposes. (Pet's. Pet. For Writ of Cert., p. 27).

Amici believe that this "solution" is perfectly calculated to enhance the twin evils of which Columbia Union now complains; discrimination against religious minorities and state intrusion and entanglement in the form of monitoring of religious schools. Once this Court decides that religious entities are eligible for direct state aid, our own history shows that state legislatures will become battlegrounds of warring religious groups seeking their portion of the legislative pie. *Lemon v. Kurtzman*, 403 U.S. 602, 628-29 (1971) (Douglas concurring). Minority religions will inevitably come off as losers, as the majority will have the political muscle to funnel funds to their preferred religions. Talk of "equal" funding in this context is empty, as religions with well developed school systems will benefit at the expense of those religions with relatively small, or non-existent, educational programs.

Further, the monitoring of discrete secular programs in otherwise fully religious colleges will involve the same type of entanglement issues of which petitioners so vehemently complain. And the entanglement concerns will be at their most sensitive, as the funds would go to entities that are pervasively and even wholly religious and sectarian.

Such a scenario alarms amici. Many of them have attended or worked for Seventh-day Adventist educational institutions, and they believe that the ability of these schools to use religious criteria in hiring and firing, to be protected from unionization, to require religiously based lifestyle standards for students and faculty are essential to furthering the spiritual mission of these institutions. These rights would be endangered by the government oversight and regulation that would go with the loss of the pervasively

sectarian category, possibly even without the acceptance of state funds. They are concerned that if state coffers are opened to religious schools, that as a matter of marketplace survival many religious schools will yield to the temptation to accept the proffered funds along with the oversight and regulation that will inevitably follow.

Such concerns are not speculative, but can be seen in the history of those church colleges that have eschewed the pervasively sectarian designation. These colleges stand as examples of what a post-pervasively sectarian world might look like, and it is not a pretty sight. A prominent Catholic scholar, commenting on the Sellenger program at issue here and its relation to Catholic schools, wrote

Catholic higher education institutions have so watered down the transmission of Catholic doctrine and practice that the distinction between their mission and that of secularly oriented colleges has become blurred enough to permit state aid to the former without violating the First Amendment. The [Court's] decision should hearten those who have hitherto opposed state aid to religious schools, since it indicates that these institutions are losing their proper religious stamp, as so many religious affiliated schools and colleges have in the past, among them the most illustrious American private universities. *On the other hand, the Court's evaluation of Catholic college education should give pause to Catholic educators and challenge them to examine whether they have sold their birthright for a mess of pottage.*

Vincent R. Vasey, *Roemer v. Board of Public Works, Maryland: The Supreme Court's Evaluation of the Religious*

Mission of Catholic Colleges and Church Expectations, 23 Cath. Law. 108 (Spring 1978).

Perhaps petitioner believes that the ill-effects observed by Vasey can be remedied by allowing state funds to go to pervasively religious schools without insisting that these institutions suppress their religious characteristics. But even under petitioner's model, state funds would not go to sectarian portions of the programs of these institutions. (Pet's. Pet. For Cert., p. 14, 23, 27) This would have the same effect as the present system, as it would cause the religious school to define more and more narrowly what were its "religious" programs so that it could use state funds as broadly as possible. Once again, this danger is not speculative. Another Catholic leader has written about the disastrous effects that state aid to secular programs has on the religious components of Catholic colleges:

Recently I was invited to speak to a group of students majoring in theology at one of the Catholic universities in the mid-west. I was taken to a nondescript, broken-down building which was . . . totally separated from the rest of the campus. That is where religion is because all of the other buildings are in one way or another funded with federal money and there can be no religion in there. The university authorities admitted that this was not a happy situation, but it was the price to be paid for the substantial amount of federal funds that had been poured into university buildings.

W.E. McManus, *Felix Culpa - Report from the Ad Hoc Committee on School Aid*, 20 Cath. Law. 347, 353-54 (Autumn 1974).

This trend towards secularization and the marginalization of religion at historically religious colleges is not limited to

Catholic institutions. This troubling phenomenon exists across the denominational spectrum, and is the subject of a book by James Tunstead Burtchaell entitled *The Dying of the Light: The Disengagement of Colleges and Universities from their Christian Churches*, (Eerdmans 1998). Burtchaell documents the fading of religious mission and spiritual direction at colleges historically run by a number of denominations, including Congregationalists, Presbyterians, Methodists, Baptists, Lutherans and Evangelicals. Among the factors involved in this devolution of faith, Burtchaell fingers the growing role played by the state in college affairs. "The regional accrediting associations, the alumni, and the *government* replaced the church as the primary authority to whom the college would give an accounting of its stewardship." *Id.* at 837 (emphasis added). Petitioner's so-called "equality" argument would only augment the widening spiral of secularism at religious colleges.

Amici are deeply alarmed by these troubling glimpses of the bold new world of "equality" advocated by petitioner. For the sake of the religious schools and colleges that they cherish, and for the sons and daughters, and grandsons and granddaughters that they hope will yet benefit from the educational and spiritual guidance of these schools, amici ask that this Court reject petitioner's request to discard the pervasively sectarian category.

CONCLUSION

Because of the inadequacy of the factual record and the importance of the pervasively sectarian category to our constitutional framework, the petition for the writ of certiorari should be denied.

Dated: May 10, 1999

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APPENDIX A

The Council on Religious Freedom ("CRF") is a national nonprofit organization that was formed to uphold and promote the principles of religious liberty and the separation of church and state. Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis. Also, several members of the CRF Board have served on the governing boards of religious educational institutions and appreciate the need for those institutions to be free to convey their sponsoring church's religious ideals. Many of the supporters of CRF have children enrolled in church-operated schools, both at the secondary and collegiate levels, and they are concerned that these schools continue as sectarian ministries of their church.

The Northwest Religious Liberty Association ("NRLA"), serves as the advocacy agency of the North Pacific Union Conference of Seventh-day Adventists. It represents the Seventh-day Adventist Church and its constituent members and organizations with the purpose of protecting and advancing the principles of religious freedom in the Northwest region of the United States. Specifically, the states of Alaska, Idaho, Montana, Oregon, and Washington.

Within this region there is one Adventist college, Walla Walla Adventist College, as well as 140 Adventist elementary and secondary schools. NRLA is responsible for looking after the religious freedom interests of these institutions, and those of the church and its members generally. Because this case involves the issue of whether Columbia Union College, an Adventist college, is "pervasively sectarian," any decision is likely to have a direct impact on the legal rights and responsibilities of other Adventist colleges and universities, whose policies and practices are similar to those of the petitioner.

The Seventh-day Adventist Church State Council serves as the religious liberty educational and advocacy arm of the Seventh-day

Adventist Church for a five state western region of the United States, including Arizona, California, Hawaii, Nevada and Utah. In this region there are two Adventist universities, Loma Linda University and La Sierra University, and one college, Pacific Union College. The Seventh-day Adventist Church State Council defends the religious freedom interests of these institutions and those of the church and its members generally.

This case involves the issue of whether an Adventist college is pervasively sectarian, and thus any decision is likely to have direct impact on the legal rights and responsibilities of other Adventist colleges and universities. Because the Seventh-day Adventist Church State Council is charged with interpreting and applying Adventist teachings and principles regarding religious freedom, amicus desires to be heard in this case.

The Interfaith Religious Liberty Foundation is a Sacramento, California based non-profit educational organization that promotes religious liberty and the separation of church and state through the funding and development of curriculum materials.

Walter Pontynen is a retired Seventh-day Adventist history teacher and administrator and currently serves as president of the Interfaith Religious Liberty Foundation. As a former professional, sectarian educator, he has an interest in preserving the freedom of religious schools to pursue their sectarian mission. As a parent and grandparent of children attending sectarian educational institutions, he has a personal interest in maintaining the ability of Seventh-day Adventist schools to preserve the purity of their religious mission.

(4)
No. 98-1509

Supreme Court, U. S.
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EDITOR'S NOTE

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IN THE
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REPLY BRIEF FOR PETITIONER

Seeking to disguise important and clearly defined constitutional issues as premature and factbound, the Commission overlooks a fundamental point. The Commission does not challenge the holding below that its actions presumptively violated Columbia Union's Free Speech and Free Exercise rights. It is against this background—not present in the antiquated precedents relied upon by the Commission—that two clearly framed issues of national significance need clarification by the Court.

First, the petition calls upon the Court to explain the current significance of the distinction it has drawn between permissible "indirect" and impermissible "direct" aid programs to religiously affiliated institutions of higher education. As the Commission would have it, the point of this constitutional inquiry is to determine whether stu-

dent fingerprints can be found on aid checks. On the other hand, Columbia Union submits that the question is whether an aid program viewed as a whole may include religious participants where the criteria for participation are secular and wholly neutral toward religion, and the state aid is ultimately distributed on the basis of the choices of individuals. The answer to this basic question resolves the entire case, regardless of anything that might occur on remand.

Nothing better illustrates the confusion in the appellate courts over this fundamental matter than the decision in *Jackson v. Benson*, 578 N.W.2d 602 (1998), cert. denied, 119 S.Ct. 496 (1998). The Commission labors to distinguish *Jackson*, and in doing so only highlights the wooden formalism to which it must cling in opposing certiorari. In *Jackson* the Supreme Court of Wisconsin held that "the importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path." *Id.* Confronted with *Jackson*, the Commission now advances as the constitutionally principled demarcation the difference between mailing an aid check reflecting a student headcount directly to a school and mailing the same amount of aid in a bundle of checks that parents are legally mandated to endorse for payment to the school. Columbia Union is hard pressed to think of a better illustration of why clarification from the Court is badly needed.

Second, the petition calls upon the Court to answer the question whether categorizing religiously affiliated institutions on the basis of whether they are "pervasively sectarian" is an enterprise that should remain part of First Amendment jurisprudence. The stakes are high. Under the Commission's view, *Roemer* demands that institutions

labelled "pervasively sectarian" be presumed untrustworthy to honor restrictions channeling government aid to secular areas of their operations, no matter how an aid program might be structured. Institutions placed on the other side of the divide—such as the Catholic colleges in Maryland—find these presumptions reversed and enjoy substantial funding advantages.

Whether *Roemer*'s binary distinction should continue to apply after *Agostini* is an urgent and important question. Even if an all-or-nothing category made sense in an era during which "no aid at all" could go to a pervasively sectarian institution, that era is now over. After *Agostini*, questions about what *type* of aid may go to religiously affiliated institutions remain ripe for decision no matter what the result of the "pervasively sectarian" analysis—except, apparently, when the questions involve institutions like Columbia Union, which did not receive the benefit of this Court's later decisions in the district court and court of appeals because its situation was deemed to be "directly controlled" by the old *Roemer* plurality decision.

After *Agostini*, there is no longer any doctrinal justification for the pervasively sectarian test in the context of a neutral aid program. This Court should therefore evaluate whether it should remain part of the law in view of the collateral damage it does to other important constitutional values. First, academic and other institutions must undergo the type of religious investigation called for by the remand here. Second, invidious discrimination by government decisionmakers is encouraged, as bureaucrats are forced to employ amorphous and subjective standards to unfamiliar religions, facing constant temptation to fall back on their own preferences and prejudices. Finally, enormous pressure is placed on religious institutions themselves to alter their religious message to avoid the dreaded

“pervasively sectarian” label, which assures them of exclusion from important benefits readily given to their secular (or even other religious) competitors.

What is the proper distinction between permissible and impermissible aid programs that include religiously affiliated institutions of higher education? Does the pervasively sectarian distinction still make any sense? On these fundamental questions the Opposition has nothing to say. The Court needs to tell us whether—as the dissent below concluded—its “later Establishment Clause cases have so undermined [*Roemer*] that it is no longer good law,” at least in the context of a higher education program of the type presented here. *Agostini v. Felton*, 117 S. Ct. 1997, 2007 (1997).

What the Opposition *does* say in response to the petition provides no reason for denial:

1. It is beyond question that this Court has the jurisdiction to review interlocutory petitions pursuant to § 1254(1). And the Court often does so. *See, e.g.,* *Marquez v. Screen Actors Guild, Inc.*, 119 S. Ct. 292, 297 (1999); *Hughes Aircraft Co. v. Jacobsen*, 119 S. Ct. 755, 760 (1999); *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2090 (1998). This is warranted where there is “a clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari.” R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 196 (7th ed. 1993).

Certiorari review is even more appropriate here because it is the remand itself that constitutes an important part of the constitutional violation Columbia Union seeks to avoid. Even in the context of assessing the finality jurisdictionally required for review of state court decisions, the Court has found review appropriate where the subse-

quent proceedings “would themselves deny the federal right for the vindication of which review is sought in the Supreme Court.” *Supreme Court Practice, supra*, at 104, citing *Colombo v. New York*, 405 U.S. 9 (1972) (double jeopardy); *Helstoski v. Meanor*, 442 U.S. 500 (1979) (speech or debate clause). Here, as explained in the petition, the very remand ordered below violates the First Amendment.¹

2. The Commission contends the remand poses no significant threat to constitutional freedoms because its inquisition will be “narrow,” focusing “only” upon such matters as how courses are taught, how faculty are hired, and how students are selected. Opp. 11. This is like telling a patient that an operation will be minor because surgery will be performed only on the heart, the lungs, and the kidneys. Ironically, academic freedom has been defined in one of this Court’s celebrated cases as a college’s freedom to decide for itself “who may teach, what may be taught, how it will be taught, and who may be admitted to study.” *Sweezy v. New Hampshire*, 334 U.S. 234, 250 (1957). These are exactly the areas into which even the Commission acknowledges the remand must intrude.

¹ The Commission audaciously suggests it is Columbia Union that has somehow changed its position in arguing against the remand. To the contrary, *both* Columbia Union and the Commission opposed any further discovery when the notion of a remand was raised for the first time during oral argument at the court of appeals. Pet. App. 33a-34a. Indeed, it merits repeating that the Commission had earlier disclaimed any intention to conduct on-campus investigations of the type it now supports, recognizing that such an investigation would create legal problems. Pet. App. 105a. The Commission’s new-found enthusiasm for the remand is just a convenient basis upon which to avoid this Court’s review. The Commission chose the record upon which it made its discriminatory decision against Columbia Union, and (as the party concededly bearing the burden of proof) chose to rest on that record at the district court. The Commission should not be entitled now to try and support its decision with after-acquired evidence.

In *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971), the Court held that "state inspection and evaluation of the religious content of a religious organization" may lead to the ultimate "intru[sion] on religion and thus conflict with the Religion Clauses." To call the consequences of the remand "minor"—either for Columbia Union or for the Catholic colleges and other institutions that must now be investigated—is grotesque. The real question is whether this type of intrusion is justified by any substantive constitutional value. That is the question that divided the panel below. This Court should provide an answer now, while the case is in a posture for it to prevent further constitutional harm.

3. The remand the Commission now advocates would do nothing to lessen the task that must ultimately be faced on appeal. The contention that there are "material issues of fact" for resolution at the district court is a fiction, unsupported by the record. Indeed, the panel majority did not even specify what facts—in the sense of objective evidence—might be developed on remand. Rather, the majority found that different *characterizations* of particular undisputed facts about Columbia Union could lead a rational factfinder to different legal conclusions about the institution. Pet. App. 25a-33a. This is the basis upon which it denied summary judgment. There are no legally significant "facts" lacking in the record.

This is not even a situation in which anything could be gained procedurally by a remand to the district court for "fact finding." Any finding by the district court that Columbia Union is pervasively sectarian would be one of "constitutional fact," subject to *de novo* review on appeal. See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995); *Bose Corp. v. Consumer's Union of United States*, 466 U.S. 485, 509 (1984). See also *Harris v.*

City of Zion, 927 F.2d 1401, 1402 n.1 (7th Cir. 1991), cert. denied, 505 U.S. 1229 (1992); *New Life Baptist Church Academy v. Town of East Longmeadow*, 885 F.2d 840, 941 (1st Cir. 1989) (each applying *Bose* standard of review in religious freedom cases).

4. The Commission offers no response to Columbia Union's demonstration that this Court's more recent cases would—if applied directly to Columbia Union's participation in the Sellinger program—support judgment for Columbia Union. Comparing Chief Judge Wilkinson's dissent with the panel majority's opinion definitively answers any question as to whether sharp divergences exist on the state of Establishment Clause doctrine in the courts below.² Plainly there is a need for this Court's guidance.

All the Commission can say is that, based upon cryptic citations to *Roemer* in later decisions, that case has not been definitively overruled, and can easily be applied by lower courts to the facts before them. But this is nothing more than a rehash of the principles a court of appeals should follow under *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). It does nothing to inform the proper exercise of certiorari review by this Court. Indeed, this Court has never taken the view that so long as an older case has not been definitively overruled, the fact that the courts of appeals understand

² The Commission picks at technicalities to distinguish the cases with which the decision below is in conflict. It dismisses *Hartmann* on grounds the aid there was insubstantial, yet that aid included cash payments from a federal agency. It dismisses *Catholic University* based upon comments from a concurring opinion, yet the majority in that case barred judicial review of a secular tenure decision on grounds that it would intrude upon protected First Amendment activity. More important, in evaluating the certworthiness of this case there is no reason to search for a case raising "identical" issues. The point is that the principle of the decision below is of recurring significance, and has divided courts in a wide variety of contexts.

they are constrained to apply it to the facts before them is a barrier to certiorari review.

For example, in the recent case of *State Oil Co. v. Khan*, 118 S. Ct. 275 (1997), the court of appeals described the basis of the *per se* rule against maximum retail price fixing of *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) as "wobbly and moth-eaten" in light of more recent precedents. The court below nonetheless understood that its job was limited to the routine task of applying that case to the facts before it absent further action by this Court. There was of course no conflict below. Yet this Court did not hesitate to grant certiorari so that it could bring antitrust law into harmony with more recent developments by overruling *Albrecht*.

The real question here is not whether a remand might produce more facts against which the *Roemer* line of cases could be applied. The real question is what should happen to an older rule of constitutional law where more recent doctrine has overtaken it. *Agostini* demonstrates that such a question is especially appropriate for certiorari review so that practical harm to education may be avoided. Otherwise colleges stand to spend thousands of hours and dollars satisfying bureaucrats and courts as to whether they are "pervasively sectarian." In *Agostini*, notwithstanding significant procedural difficulties not present here, Justice O'Connor observed that "it would be particularly inequitable for us to bide our time waiting for another case to arise while" educational dollars were wasted in complying with a rule that was no longer valid. 117 S. Ct. at 2018-19.

5. This is not the factbound *Roemer redux* depicted by the Commission. In the twenty-three years since *Roemer*, this Court has established in *Witters* that neutral higher education programs can include religious participants; it has established in *Agostini* that even pervasively sectarian

primary schools need not be cut off from all government aid; and perhaps most importantly, it has established in *Rosenberger* that religious organizations have a right under the First Amendment not to be excluded from neutrally available government programs on the basis of viewpoint discrimination.³ The important question for decision is how those principles should apply today to a program employing neutral secular criteria, in which funding is apportioned on the basis of student attendance choices and funds are restricted to secular uses.

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³ Columbia Union has already been found to enjoy a constitutional right under the Free Speech and Free Exercise Clauses to participate in the Sellinger program. The Commission has not taken issue with the Fourth Circuit's findings on this point and cannot now do so. See Rule 15.2. This case is therefore a particularly good vehicle for clear presentation of the question of how Free Speech and Free Exercise rights are to be harmonized with Establishment Clause requirements in the context of aid to higher education.

THOMAS, J., dissenting

SUPREME COURT OF THE UNITED STATES

COLUMBIA UNION COLLEGE v. EDWARD O.

CLARK, JR., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 98-1509. Decided June 14, 1999

5

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, dissenting from the denial of certiorari.

Through the program at issue in this case—a program named, ironically, for Father Joseph Sellinger, a Roman Catholic priest—the State of Maryland provides financial aid, on a per student basis, to a wide range of private colleges. Although many of the colleges participating in the Sellinger Program are affiliated with religious institutions, Maryland deemed Columbia Union College, a private liberal arts college affiliated with the Seventh-day Adventist Church, “too religious” to participate. Throughout this litigation, Columbia Union College has maintained that Maryland violated its free speech, free exercise, and equal protection rights by excluding it from the Sellinger Program. The District Court and Court of Appeals for the Fourth Circuit agreed that the State’s action infringed one or more of these rights. But, relying on our decision in *Roemer v. Board of Public Works of Md.*, 426 U. S. 736 (1976) (plurality opinion), both courts nonetheless concluded that Columbia Union’s exclusion could be justified by Maryland’s compelling interest in enforcing the Establishment Clause by ensuring that a “pervasively sectarian” institution did not benefit from public funds.

We invented the “pervasively sectarian” test as a way to distinguish between schools that carefully segregate religious and secular activities and schools that consider their religious and educational missions indivisible and therefore require religion to permeate all activities. In my

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THOMAS, J., dissenting

view, the "pervasively sectarian" test rests upon two assumptions that cannot be squared with our more recent jurisprudence. The first of these assumptions is that the Establishment Clause prohibits government funds from ever benefiting, either directly or indirectly, "religious" activities. See *Roemer, id.*, at 755. The other is that any institution that takes religion seriously cannot be trusted to observe this prohibition.¹

We no longer require institutions and organizations to renounce their religious missions as a condition of participating in public programs. Instead, we have held that they may benefit from public assistance that is made available based upon neutral, secular criteria. See *Agostini v. Felton*, 521 U. S. 203 (1997) (students attending religious schools eligible for federal remedial assistance); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995) (Christian student organization eligible for student activity funds); *Zobrest v. Catalina Foothills School Dist.*, 509 U. S. 1 (1993) (publicly funded sign language interpreter could assist student in a Catholic school); *Witters v. Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986) (blind student free to use public vocational assistance to attend bible college). Furthermore, the application of the "pervasively sectarian" test in this and similar cases directly collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity. See *Rosenberger, supra* (invalidating university policy denying student activity funds to Christian student newspaper); *Lamb's Chapel v. Center*

¹Typical of this assumption is the plurality's statement in *Tilton v. Richardson*, 403 U. S. 672, 681 (1971), that "[t]here is no evidence that religion seeps into the use of any of these facilities . . . the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination."

THOMAS, J., dissenting

Moriches Union Free School Dist., 508 U. S. 384 (1993) (invalidating “religious use” restriction on public access to school district property); *Widmar v. Vincent*, 454 U. S. 263 (1981) (invalidating policy prohibiting student religious organizations from using public university’s facilities).

We should take this opportunity to scrap the “pervasively sectarian” test and reaffirm that the Constitution requires, at a minimum, *neutrality* not *hostility* toward religion. See *Bowen v. Kendrick*, 487 U. S. 589, 624-625 (1988) (KENNEDY, J., joined by SCALIA, J., concurring). By so doing, we would vindicate Columbia Union’s right to be free from invidious religious discrimination.² Columbia Union’s exclusion from the Sellinger Program “raise[s] the inevitable inference that the disadvantage imposed is born of animosity to the class of [institutions] affected,” namely, those schools that insist upon integrating their religious and secular functions. *Romer v. Evans*, 517 U. S. 620, 634 (1996); see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 547 (1993) (“[U]pon even slight suspicion that proposals for state intervention stem from animosity toward religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures”). We also would provide the lower courts—which are struggling to reconcile our conflicting First Amendment pronouncements—with much needed guidance. Compare *Peter v. Wedl*, 155 F. 3d 992 (CA8 1998) (holding that the First Amendment

²Indeed, Maryland is not the only State that practices religious discrimination in the distribution of financial aid. See, e.g., Colo. Rev. Stat. §23-3.5-101-106 (1998) (students attending pervasively sectarian colleges ineligible for Colorado Student Incentive Grant Program); Wash. Rev. Code §28B.10.814 (1994) (students pursuing a theology degree ineligible for state financial aid programs); Wis. Stat. Ann. §39.30(2)(d) (Supp. 1998-1999) (state tuition grants shall not be awarded to “members of religious orders who are pursuing a course of study leading to a degree in theology, divinity or religious education”).

THOMAS, J., dissenting

prohibits school district from denying special education services to a child solely because he attends a religious school), and *Hartmann v. Stone*, 68 F. 3d 973 (CA6 1995) (invalidating policy excluding religious day care centers from Army program), with *Strout v. Albanese*, 1999 U. S. App. LEXIS 10932 (CA1 May 27, 1999) (upholding state law excluding students who attend religious schools from education tuition program), and *Bagley v. Raymond School Dept.*, 728 A. 2d 127 (1999) (same).

Although the Court declines to grant certiorari today—perhaps because this case comes to us in an interlocutory posture—the growing confusion among the lower courts illustrates that we cannot long avoid addressing the important issues that it presents.